(21,757.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 274.

RUTHER JACOBS, LILLIE JACOBS, AND E. D. WILCOX, AS GUARDIAN OF RUTHER JACOBS, PLAINTIFFS IN ERROR,

vs.

A. G. PRICHARD, TRUSTEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 7, 1910.

1 6668.

Filed Feb. 27, 1907. C. S. Reinhart, Clerk.

2 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER, SILAS MEEKER, MAUD MEEKER, JERRY MEEKER, as Guardian of Silas Meeker and Maud Meeker, Minors; Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs and Lillie Jacobs, Minors, Defendants.

Transcript to the Supreme Court.

3 In the Superior Court of the State of Washington for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER, SILAS MEEKER, MAUD MEEKER, JERRY MEEKER, as Guardian of Silas Meeker and Maud Meeker, Minors; Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs and Lillie Jacobs, Minors, Defendants.

Complaint.

Comes now the above named plaintiff, by his attorneys Ellis & Fletcher, and complaining of the above named defendants, for cause of action alleges as follows:

I.

That the above named defendants, Silas Meeker and Maud Meeker, are minors, and that the above named defendant, Jerry Meeker, is their father and their duly and regularly appointed, qualified and acting guardian, appointed by order of the Superior Court of the State of Washington, for Pierce County in proper proceedings therefor.

II.

That the above named defendants, Ruther Jacobs and Lillie Jacobs, are minors and the above named defendant, E. D.
4 Wilcox, is their duly and regularly appointed, qualified and acting guardian, appointed by order of the Superior Court,

of the State of Washington, for Pierce county, in proper proceedings therefor.

III.

That the above named plaintiff, A. G. Prichard, Trustee, is now, and for a long time hitherto has been, the owner and in possession of that certain piece or parcel of land situate, lying and being in the county of Pierce and State of Washington, and described as follows, to-wit:

The east half (E. ½) and the east half (E. ½) of the east half (E. ½) of the west half (W. ½) of the Northeast quarter (N. E. ¼) of the Northwest quarter (N. W. ¼) of Section thirty-five (35), Township twenty-one (21, North, range three (3) East of the Willamette Meridian, said land being heretofore situated, in King county, State of Washington but now a part of Pierce county, State of Washington.

IV.

That the above named defendants and each of them claim and assert an interest and interests in said above described real estate and each and every part thereof adverse to plaintiff, and that the claims of said defendants are, and each of them is, without any right whatever, and that said defendants have not, nor have either of them, any estate, right, title or interest whatever in said lands or premises or any part thereof.

Wherefore, Plaintiff prays that said defendants and each of them may be required to set forth the nature of their claims, and that all adverse claims of said defendants or either of them may be determined by judgment and decree of this court and that by said judgment and decree it is declared and adjudged that, plaintiff is the owner of said premises and that the defendants or either of them have no title or interest whatever in or to said land or premises or any part thereof, and that said defendants and each and every of them be forever barred from asserting any claim whatever in or to said land or premises and each and every part thereof adverse to plaintiff, and that plaintiff have such other, further and general relief as to the court may seem just and equitable in the premises.

ELLIS & FLETCHER,
Attorneys for Plaintiff.

P. O. Address, 511 Fidelity Bldg., Tacoma, Pierce County, Washington.

STATE OF WASHINGTON,
County of Pierce, ss:

A. G. Prichard, being first duly sworn, on oath says: That he is the A. G. Prichard, Trustee, plaintiff in the above entitled action; that he has read the foregoing complaint knows the contents thereof and believes the same to be true.

A. G. PRICHARD.

Subscribed and sworn to before me this 14th day of December, 1905.

[SEAL.] JNO. D. FLETCHER,
Notary Public for the State of Washington,
Residing at Tacoma, Pierce County, Wash.

Filed in Superior Court, Dec. 14, 1905. A. M. Banks, Clerk.

6 In Superior Court, State of Washington, for Pierce County.

#24003.

A. G. PRICHARD
vs.
JERRY MEEKER et al., Defendants.

Come now the defendants, Lilly and Ruther Jacobs and E. D. Wilcox, as guardian of Ruther Jacobs and Lilly Jacobs and move the court that the plaintiff be required to make his complaint definite and certain by *defraining* this title from the United States or from such other source as he may derive the same and that he be required to state when he became the owner of and entered into possession of the land and premises in said complaint described.

E. D. WILCOX,
Attorney for Above Named Defendants.

Received copy of above Jan'y 5, 1906.
ELLIS & FLETCHER,
Att'ys for Pl'ff.

Filed in Open Court, Dept. No. 2, Jan. 27, 1906. A. M. Banks, Clerk. Libby, Dep.

7 In the Superior Court, Pierce County, Washington.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Memorandum of Journal Entry.

This matter *come* on for hearing upon motion of the defendants Ruther Jacobs, Lilly Jacobs and E. D. Wilcox as Guardian, of said defendants, to make the complaint definite and certain, upon argument of counsel; it is ordered

That said motion be denied and def'ts given 10 days to plead. Defendants except.

THAD HUSTON, *Judge.*

Entered in Journal No. 107, at Page 300, Dept. No. 2, on Jan. 27, 1906. Filed in Open Court, Dept. No. 2, Jan. 27, 1906. A. M. Banks, Clerk. Libby, Dep.

8 In Superior Court, State of Washington, for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Answer of Lilly and Ruther Jacobs and E. D. Wilcox, as Guardian.

Come now Lilly Jacobs, Ruther Jacobs and E. D. Wilcox as Guardian of said Lilly and Ruther Jacobs, and for answer to the complaint herein:

1.

They admit each and every allegation contained in the second paragraph of said complaint.

2.

They deny each and every allegation contained in the third paragraph of said complaint.

3.

They admit, in answer to the fourth paragraph of said complaint, that they and each of them claim and assert an interest and interests in the land and premises described in the third paragraph of said complaint and each and every part thereof adverse to the plaintiff, and they deny each and every other allegation contained in said fourth paragraph.

Further Answer & Defense.

The answering defendants for further answer to the complaint and by way of special defense to the complaint allege:

9 1.

That the defendants Lilly Jacobs and Ruther Jacobs are minors under the age of 18 years, and E. D. Wilcox, is their duly appointed, qualified and acting guardian.

2.

That on the 30th day of January, 1886, under the provisions of the treaty made and entered into by the Puyallup and allied bands and tribes of Indians on the one part and the United States an the other part (10 Sts. at L. P. 1132) the United States, made, executed and

delivered to Charley Jacobs, a patent for certain lands in the Puyallup Indian Reservation, in Pierce county, Washington, and the lands in dispute in this action are a part of the lands so patented to said Charley Jacobs. That said Patent so executed and delivered to said Charley Jacobs, is in the words, letters and figures following, to-wit:

"THE UNITED STATES OF AMERICA:

"To all to whom these presents shall come, Greeting:

"Whereas, by the sixth article, of the treaty concluded on the 26th day of December, Anno Domini, one thousand eight hundred and fifty-four, between Isaac I. Stevens, governor and superintendent of Indian Affairs, on the part of the United States, and the chiefs, headmen and delegates of the Nisqually, Puyallup, Steilacoom, Squaksin, S'Homanish, Stechase, T'Peeksin, Squi-aitl, Sa-heh-wamish tribes and bands of Indians, it is provided that the President "at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected, in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege
10 and will locate of the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

And whereas, there has been deposited in the General Land Office of the United States, an order bearing date January 20, 1886, from the Secretary of the Interior accompanied by a return dated October 30, 1884, from the office of Indian affairs, with a list approved October 23, 1884, by the President of the United States, showing the names of the members of the Puyallup band of Indians, who have made selections of land in accordance with the provisions of said treaties, in which list the following tracts of land have been designated as the selection of Jake Tai-ugh or Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank and Oscar, viz:

The Northeast quarter of the southwest quarter of section one (40.00 acres) in township twenty nort-, the east half of the northwest quarter and the northwest quarter of the northeast quarter of section thirty-five (120.00 acres) in township twenty-one north, of range three East of the Willamette Meridian, Washington Territory, containing in the aggregate one hundred and sixty acres.

Now know ye, That the United States of America, in consideration of the premises and in accordance with the direction of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four with the Omaha Indians, has given and granted, and by these presents, does give and grant unto the
11 said Jake Tai-ugh or Charley Jacobs, as the head of the family aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts "Shall

not be alienated or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions" and "No state legislature shall remove the restrictions without the consent of Congress."

To have and to hold, the said tracts of land, with the appurtenances unto the said Jake Tai-ugh or Charley Jacobs as the head of the family as aforesaid and to his heirs forever with the stipulations aforesaid.

In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this thirteenth day of January, in the year of our Lord one thousand eight hundred and eighty-six and of the Independence of the United States, the one hundred and tenth.

By the President.

GROVER CLEVELAND.
By M. McKEAN, *Secretary.*

Recorded Vol. 1, p. 56.
[G. L. O. SEAL.]

S. W. CLARK.
Recorder of the General Land Office.

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3.

That at the time of the issuance of said patent and for a long time prior thereto Charley Jacobs and Julia Jacobs, were husband and wife, and were residing upon said land in said patent described and that Julia Jacobs is the person mentioned in said patent as "Julia" a member of the family of said Charley Jacobs; that Annie mentioned in said patent as a member of the family of Charley Jacobs was the sister of said Charley Jacobs and lived with him; that Frank mentioned in said patent is the son of Charley Jacobs, but not the son of Julia; that Oscar mentioned in said patent is the son of Charley and Julia Jacobs and Oscar and Frank are the person- mentioned in the said patent; that Lilly and Ruther defendants herein, were born after the issuance of said patent and are the children of said Charley Jacobs and Julia Jacobs, and are full sister and brother respectively of said Oscar Jacobs.

4.

That Annie, the sister of said Charley Jacobs died first unmarried and without issue leaving as her next of kin and sole heir at law, her brother Charley Jacobs.

5.

That Charley Jacobs, died, in Pierce County, Washington, on or about the 26th day of January, 1900, intestate, leaving him surviving as his next of kin and heirs at law, his wife, Julia, and his sons Frank, Oscar, and Ruther, and his daughter, Lilly Jacobs, the last three mentioned being the children of Charley and Julia Jacobs.

6.

That on or about the 4th day of October, 1900, Julia
13 Jacobs, died in Pierce County, Washington, intestate, and left her surviving as her next of kin and sole heirs at law, Oscar Jacobs, Lilly Jacobs, and Ruther Jacobs, the children of herself and Charley Jacobs, and a son by a former husband, known as Sam Johnny. That Sam Johnny was never a member of the family of said Charley Jacobs.

7.

That by reason of the facts aforesaid, and the law, upon the death of the said Charley Jacobs, and Julia Jacobs, aforesaid, the answering defendants, Lilly Jacobs and Ruther Jacobs, became and now are the owners of an undivided one-half interest in and part of the northeast quarter of the northwest quarter of section thirty-five, township twenty-one north of range three east of the W. M., the same being a part of the land so patented, to said Charley Jacobs, as aforesaid, and the same embracing the land in the complaint herein described, and said defendants have not, nor has either of them conveyed or sold said land or any part thereof.

Wherefore, the answering defendants pray the decree of this court declaring them to be the owners of an undivided one-half interest in and to the lands and premises in the complaint herein described free and clear from any claim, interest right or demand of the plaintiff and that the plaintiff be forever barred and prohibited from asserting or claiming any right or interest therein as against these defendants or their heirs or assigns.

That they have judgment against the plaintiff for their costs and disbursements herein.

E. D. WILCOX,
Attorney for Defendants Jacobs.
14 IRA A. TOWN,
Of Counsel.

STATE OF WASHINGTON,
County of Pierce, ss:

E. D. Wilcox, being duly sworn on oath says, that he is guardian of the above named answering defendants, minors, and makes this verification for and in their behalf; that he has read the foregoing complaint and knows the contents thereof that he believes the same to be true.

E. D. WILCOX.

Subscribed and sworn to before me Feb'y 5, 1906.
L. M. GLIDDEN,
Notary Public, Residing at Tacoma, Wash.

Received copy of foregoing answer, Feb'y 5, 1906.
ELLIS & FLETCHER,
Per U., *Att'y. for Plaintiff.*

Filed in Superior Court, Jun- 8, 1906. A. M. Banks, clerk.

15 In the Superior Court of the State of Washington for Pierce County.

No. —.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Reply to the Answer of Lillie and Ruther Jacobs and E. D. Wilcox, as Guardian.

Comes now the above named plaintiff, and replying to the further answer and defense of defendants, Lillie and Ruther Jacobs, and E. D. Wilcox, as Guardian, herein, for reply alleges as follows:

1.

That as to the allegations contained in paragraph three thereof, reading as follows: "That Lillie and Ruther defendants herein, were born after the issuance of said patent and are the children of said Charley Jacobs and Julia Jacobs, and are full sister and brother respectively, of said Oscar Jacobs," plaintiff has not knowledge or information sufficient to form a belief, and therefore denies the same.

2.

That plaintiff has not knowledge or information sufficient to form a belief, as to the allegations matter and things contained in paragraph five thereof and therefore denies the same.

3.

That plaintiff has not knowledge or information sufficient to form a belief as to the allegations, matters and things con-
16 tained in paragraph six thereof and therefore denies the same.

4.

That plaintiff denies each and every allegation, matter and thing contained in paragraph seven thereof.

For an affirmative reply plaintiff alleges as follows:

1.

That plaintiff refers to paragraph second of defendant's further answer and defense and makes the same a part of this reply.

2.

That in the latter part of the year, 1898 said Charley Jacobs, together with all the others named in said patent, either in person or by their heirs or guardians, pursuant to the Act of Congress, of March 3, 1893, signed, executed and acknowledged an instrument

in writing, wherein and whereby pursuant to said Act of Congress they consented to the sale of the premises described in plaintiff's complaint in this action, and appointed Clinton A. Snowden of Tacoma, Washington, as Commissioner of Puyallup lands, appointed in pursuance of a provision contained in the Act of June 7, 1897 (30 Stats., 62) etc., the Trustee to sell said land at its appraised value and to make deeds to the purchaser therefor; all subject to the approval of the Secretary of the Interior; said sale to be one-third cash, the balance in five yearly equal payments with six per cent interest thereon. That pursuant to said Act of Congress said Snowden as Trustee and Commissioner aforesaid transmitted said written consents and all other papers and instruments relative to the
17 sale of said land to the Secretary of the Interior, and the same were thereafter on the 20th day of February, 1899, approved by said Secretary, and said Snowden as Trustee and Commissioner aforesaid was directed to proceed with said sale. That thereafter pursuant to said consents and pursuant to the instructions of said Secretary of the Interior, said Snowden, as Trustee and Commissioner aforesaid, on the 27th day of February, 1901, offered said premises for sale at public auction and the same were purchased by plaintiff herein for the sum of twelve hundred and fifty dollars ($1250.00) of which plaintiff paid $420.00 cash and agreed to pay the balance in five equal payments to-wit: on or before February 27th, in each of the years, 1902, 1903, 1904, 1905 and 1906 with interest at six per cent. per annum. That said Clinton A. Snowden as Trustee and Commissioner as aforesaid, did thereupon on said February 27, 1901, execute and deliver to plaintiff herein a deed to said premises, and plaintiff ever since has been and now is, the owner of said premises.

3.

That plaintiff is informed that defendants, Lillie and Ruther Jacobs, are minor children, of said Charley Jacobs and his wife, Julia Jacobs, to whom said land was patented; that after said sale of said premises to plaintiff by said Snowden as aforesaid, defendant, E. D. Wilcox, herein was appointed by this court as their guardian and duly qualified as such, and ever since has been and now is their said guardian: that as their said guardian said Wilcox has received from the Interior Department of the United States the share assigned by said Department to said Lillie and Ruther Jacobs of the moneys paid in by plaintiff on said purchase and that plaintiff
18 has now paid in all the money called for by said deed from said Snowden to plaintiff; that said guardian has made various and sundry reports to this court of his acts and doings as guardian and has in several different reports reported the receipt of such moneys and reported the sale of said premises by said Snowden as Trustee and Commissioner to plaintiff herein: that no objections or exceptions whatsoever have ever been made or taken by him to said sale; that said guardian's acts in the taking of said money, and his report of said sale have been confirmed and approved by this Honorable Court in several of its different orders in said guardianship proceeding.

4.

That said minors have not now; nor have they at any time ever had, any right, title, claim or interest in or to said premises or any part thereof, but the claim that their said guardian is now making for them and on their behalf constitutes a cloud on plaintiff's title.

Wherefore, Plaintiff prays judgment and decree of this court according to the prayer of his complaint now on file in this cause.

ELLIS & FLETCHER,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Pierce, ss:

A. G. Prichard, being first duly sworn, on oath says: That he is the plaintiff in the above entitled action, has read the foregoing reply, knows the contents thereof, and believes the same to be true.

A. G. PRICHARD.

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Subscribed and sworn to before me this 26 day of February, 1906.

JNO. D. FLETCHER,
Notary Public for the State of Washington,
Residing at Tacoma, Pierce County, Washington.

Service by copy of the within papers within Pierce County, Wash., admitted this 26 day of Feb'y, 1906.

E. D. WILCOX,
Attorneys for Plaintiff.

Filed in Superior Court, Mar. 9, 1906.
A. M. BANKS, *Clerk.*

20 In the Superior Court of the State of Washington for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER, SILAS MEEKER, MAUD MEEKER, and JERRY MEEKER, as Guardian of Silas Meeker and Maud Meeker, Minors, and Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs and Lillie Jacobs, Minors, Defendants.

Findings of Fact and Conclusions of Law.

Now, to-wit, this 3rd day of August, A. D. 1906, this cause having heretofore been regularly tried to the Court on the pleadings and the agreed statement of facts signed and filed herein, and the Court having heard the arguments of counsel for the parties appearing herein, and being fully advised in the premises, now finds the following facts:

1.

That each and every of the defendants have been duly regularly and legally served with summons in this action, and that defendants, Jerry Meeker, Silas Meeker, Maud Meeker and Jerry Meeker as Guardian of Silas Meeker and Maud Meeker, have not in any manner appeared herein, and they are and each them is in default herein, and a default has been by order of this court, entered herein against them and each of them.

21

2.

That defendants, Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as their Guardian, have appeared and filed an answer herein and thereafter said last named defendants and plaintiff signed an agreed statement of facts and filed the same herein.

3.

That this is a contest over the ownership and title to the east half and the east half of the east half of the west half of the northeast quarter of the northwest quarter of Section thirty-five (35), township twenty-one (21), North of Range three (3) east of the Willamette Meridian, Pierce County Washington, formerly in King county, Washington.

This land lies in the Puyallup Indian Reservation and was allotted or patented by the United States Government on the 30th day of January, 1886, to Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank and Oscar, all Puyallup Indians, said allotment or patent being subject to the stipulations and conditions contained in Article Six of the Treaty of the United States with the Omaha Indians. Said allotment or patent and said Article Six of the Treaty with the Omahas, are set forth fully in the agreed statement of facts.

4.

Plaintiff claims title by deed from C. A. Snowden, Trustee and Commissioner of Puyallup Lands, appointed by the United States Government under Act of Congress to sell these lands under the conditions as set forth in said Act, said Act being of date March 3, 1893. The sale and deed from Snowden to plaintiff herein was of date the 27th day of February, 1901.

22 These answering defendants claim title to an undivided part of the premises in question as heirs of Charley and Julia Jacobs, deceased, and further claim the Snowden, deed void as to them or as to the interest they would take as such heirs for the reason that the Snowden sale and deed were after the death of Charley and Julia Jacobs.

5.

The answering defendants were not named in the patent to Charley Jacobs and were in fact, at that time unborn.

That Charley Jacobs, prior to his death, together with all the other members of his family named in the patent, signed written

consents appointing C. A. Snowden, Trustee to sell the premises in question under the Act of Congress, of March 3, 1893. After these consents, with the appraisement papers and other papers, were transmitted, by said Snowden to the Secretary of the Interior, and after they were approved by said Secretary and a sale of the premises authorized, the said Charley Jacobs and Julia Jacobs, died, leaving, among other of their heirs and children, answering defendants herein, who were then and are now minors.

No one at any time attempted to revoke the authority in Mr. Snowden, to sell under Act of March 3, 1893, and notwithstanding the death of Charley Jacobs and Julia Jacobs, Mr. Snowden did thereafter on the 27th day of February, 1901, sell the premises in question to plaintiff who paid a fair consideration for the same. The cash part of the purchase price was paid into the Secretary of the Interior and by him distributed to the persons entitled thereto; among others to E. D. Wilcox, as Guardian of answering defendants, and that prior to the commencement of this action plaintiff paid to the Secretary of the Interior the balance of the purchase price,
23 but answering defendants have refused to accept their part of this balance and have tendered to plaintiff the portion of the purchase money that they had already received.

6.

The question now to be decided is, whether the death of Charley Jacobs and Julia Jacobs, after their authorization together with the authorization of all the original allottees to Mr. Snowden, to sell under the Act of March 3, 1893, would, in itself, revoke his authority to sell and avoid any sale or deed made after their death.

7.

The court further finds that from the date of the appointment of the Commissioners under the Act of March 3, 1893, which appointment was made about November 1893, the Secretary of the Interior has "uniformly held that the death of an allottee did not revoke his written consent of sale; that such consent was something more than a mere power of attorney; that it was in the nature of a trust to be carried out in the case of his death, for the benefit of his legal heirs, The Puyallup Commission was made a trustee by the respective written consents executed by the allottees and true owners of Puyallup allotted lands, to sell and convey the lands for which consent of sale had been given. Such written consents were regarded as in the nature of a written agreement of contract whose terms and conditions should not be allowed to fail of performance or execution by reason of the death of the Indian allottee or true owner." That the Puyallup Indian Commission, from the time of their appointment in November, 1893, until 1903, when said Commission ceased to make further sales pursuant to an Act of Congress in regard thereto, uniformly pursued the interpretation given to this matter by the
24 Secretary of the Interior as above, and said interpretation has now become the basis of numerous titles and has been uni-

formly acquiesced in to this date, and having thus become a rule of property should not now be disturbed, and the interpretation thus given by the Secretary of the Interior should now be upheld in this case.

8.

That at the time of the commencement of this action plaintiff filed in the Auditor's Office of Pierce County, Washington, a notice of the pendency of this action.

9.

The Court finds the facts of this case to be as set forth in the agreed statement of facts signed and filed herein.

As Conclusions of Law.

The Court concludes as matters of law from the foregoing Findings of Fact, that plaintiff is entitled to a judgment and decree herein declaring and adjudging plaintiff to be the owner of the premises in question in fee simple absolute, and that the defendants and each and every of them, and any and all other persons claiming, through, by or under them or any of them since the commencement of this action, have no title or interest whatsoever, in or to the premises in question or any part of the same, and that the defendants and each and every of them, and any and all other persons claiming through, by or under them or any of them since the commencement of this action be forever barred from asserting any claim whatsoever in or to the premises in question and each and every part of the same; that plaintiff have judgment against the contesting defendants to-wit:—Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as their Guardian, for his costs and disbursements herein; and it is ordered that a decree be entered in accordance with the foregoing

Findings of fact and Conclusions of Law.

25 Done in open Court this 3rd day of August, A. D. 1906.

THAD HUSTON, *Judge.*

Filed in Superior Court, Aug. 4, 1906.
A. M. BANKS, *Clerk.*

26 In the Superior Court of the State of Washington for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,

vs.

JERRY MEEKER, SILAS MEEKER, MAUD MEEKER, and JERRY MEEKER, as Guardian of Silas Meeker and Maud Meeker, Minors, and Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs and Lillie Jacobs, Minors, Defendants.

Decree.

Now, to-wit, this 3rd day of August, 1906, this cause coming on for hearing on motion of plaintiff for a judgment and decree herein

according to the Findings of Fact and Conclusions of Law heretofore found, signed by the Court and entered herein; plaintiff appearing by his attorneys, Ellis & Fletcher, and the defendants, Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as their Guardian, appearing by their attorneys, E. D. Wilcox and Ira A. Town; and the other defendants herein failing to appear, their default having been previously entered herein; and the Court being fully advised in the premises and finding that heretofore, after a trial to the Court had been had, the Court found, signed and caused to be entered herein its Findings of Fact and Conclusions of Law, the Court now finds that plaintiff's motion should be granted and that plaintiff is entitled to a judgment
27 and decree herein according to said Findings of Fact and Conclusions of Law.

Wherefore, it is Ordered, Adjudged and Decreed, by the Court, that plaintiff, A. G. Prichard, Trustee, is the owner in fee simple absolute of the following described premises, lying and being in the County of Pierce, State of Washington, and described as follows, to-wit:

The east half and the east half of the east half of the west half of the northeast quarter of the northwest quarter of Section thirty-five, Township twenty-one (21), North of Range three (3) East of the Willamette Meridian; all in Pierce County, Washington, formerly in King County, Washington.

That the defendants, Jerry Meeker, Silas Meeker, Maud Meeker and Jerry Meeker, as Guardian of Silas Meeker and Maud Meeker, Minors, and Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as Guardian of Ruther Jacobs and Lillie Jacobs, Minors, and any and all other persons claiming through, by, or under them or any of them since the commencement of this action, have no right, title, claim or interest of any kind or nature in or to said premises or any part of the same, and that said defendants and each of them, and any and all other persons claiming through, by or under them or any of them since the commencement of this action, be, and hereby are decreed to be forever barred from asserting any claim whatsoever in or to said premises or any part of the same.

It is Further Ordered, Adjudged and Decreed, by the Court, that plaintiff, A. G. Prichard, Trustee, do have and recover of and from defendants, Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as their Guardian, his costs taxed and to be taxed herein.

28 Done in open Court, this 3rd day of August, 1906.

THAD HUSTON, *Judge.*

Ent. J. 103, p. 404, Aug. 4, 1906.
Entered Ex. Doc. No. 22, Page 199.
Filed in Superior Court, Aug. 4, 1906. A. M. Banks, Clerk.

29 In the Superior Court of the State of Washington for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Exceptions to Findings of Fact and Conclusions of Law.

Come now Ruther Jacobs, Lilly Jacobs and E. D. Wilcox as Guardian of Ruther and Lilly Jacobs, and except to the Findings of Fact and Conclusions of Law, made and filed herein as follows:

1. They except to the 6th Finding of Fact as made by the Court.
2. They except to the 7th Finding of Fact as made by the Court.
3. They except to the 9th Finding of Fact as made by the Court.
4. They except to the Conclusions of Law made by the Court and to each and every part thereof.

IRA A. TOWN &
E. D. WILCOX,
Attorneys for the Defendants Ruther and Lilly Jacobs and E. D. Wilcox, as Guardian.

Received copy of foregoing Aug. 9-1906.
ELLIS & FLETCHER,
Att'ys for Pl'ff.

Filed in Superior Court, Aug. 9, 1906. A. M. Banks, Clerk.

30 In the Superior Court of the State of Washington for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Notice of Appeal.

Notice is hereby given, that the defendants, Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as guardian of Lillie and Ruther Jacobs, appeal to the Supreme Court of the State of Washington, from the judgment and decree entered in the above entitled action on the 3rd day of August, 1906.

IRA A. TOWN,
Attorney for Above-named Appellants.

To the above named plaintiff and Ellis & Fletcher, his attorneys.

Received copy of foregoing notice of appeal, this 29th day of October, 1906.

ELLIS & FLETCHER,
Attorney- for Plaintiff.

Entered Jour. 112, Dept. 2, page 315, Oct. 29-1906.
Filed in Superior Court, Oct. 29-1906. A. M. Banks, Clerk.

31 In the Superior Court of the State of Washington in and for Pierce County.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff and —,
vs.
JERRY MEEKER et al., Defendant and —.

Appeal Bond.

Know all Men by these Presents, That we, Ruther and Lillie Jacobs by E. D. Wilcox, G'rd'n, and Lillie Jacobs the appellants above named, as principal and the National Surety Company, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the respondent above named, in the just and full sum of Two Hundred Dollars ($200.00) for which sum well and truly to be paid, we bind ourselves, our, and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of Oct., 1906.

The condition of this obligation is such, that whereas, the above named respondent on the 3rd day of August, A. D. 1906, in the above entitled action and court, recovered judgment against the appellant above named quieting title to certain land and for costs, amounting to $19.00.

And Whereas, the above named principals have heretofore given due and proper notice that they appeal from said decision and judgment of said Superior Court to the Supreme Court of the

32 State of Washington.

Now therefore, If the said principal- shall pay to said respondent above named, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof then this obligation to be void; otherwise to remain in full force and effect.

RUTHER AND LILLIE JACOBS,
By E. D. WILCOX, *Their Guardian.* [SEAL.]
LILLY JACOBS, [SEAL.]
By E. D. WILCOX, *Her Att'y-in-fact.* [SEAL.]
[SEAL.] NATIONAL SURETY COMPANY,
By P. C. KAUFFMAN, *Resident Vice-President.*

Attest:
W. H. OPIE,
Resident Ass't Secretary.

Filed the 29th day of October, 1906.

A. M. BANKS, *Clerk*,
By PETER DAVID, *Deputy*.

Entered in Book J. of Bonds, P. 105.

33 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER, SILAS MEEKER, MAUD MEEKER, JERRY MEEKER, as Guardian of Silas Meeker and Maud Meeker, Minors; Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs and Lillie Jacobs, Minors, Defendants.

Certificate.

STATE OF WASHINGTON,
County of Pierce, ss:

I, J. F. Libby, County Clerk and by virtue of the laws of the State of Washington ex officio Clerk of the Superior Court of the State of Washington, for Pierce County, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the —— to transmit to the Supreme Court.

In witness whereof, I have hereunto set my hand and seal of the said Superior Court at my office in the City of Tacoma, this — day of ——, A. D. 1906.

J. F. LIBBY, *Clerk*,
By —— ——,
Deputy Clerk.

Endorsed: Filed in Superior Court Jan. 8, 1907. J. F. Libby, Clerk, By —— ——, Deputy.

34 Filed Feb. 27, 1907. C. S. Reinhart, Clerk.

In the Superior Court of the State of Washington for Pierce County.

6668.

No. 24003.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Statement of Facts on Appeal.

Come now defendants, Ruther Jacobs and Lillie Jacobs, and E. D. Wilcox as their guardian, and serve and file the following as a statement of facts in the above action, viz:

This cause came on regularly for trial before the court, sitting without a jury and by stipulation of all the parties appearing in the action, the following facts and evidence was submitted to the court as the facts involved in this action.

That on January 30, 1886, the premises in controversy, with other lands, were patented to Jake Tai-ugh or Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank and Oscar, all Indians and members of the Puyallup Tribe. The patent is as follows:

Whereas by the Sixth Article of the Treaty concluded on the 26th day of December, 1854, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs of Washington Territory on the part of the United States and the chiefs, headmen and delegates of the Nisqually, Puyallup, Steilacoom, Squaw-ksin, S'homanish, Ste-chass, T'Peeksin, Squit-aitl and Sa-ch-wamish tribes and bands of Indians it is provided that the President "at his discretion cause the whole or any portion of the lands hereby reserved or of such other land as may be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas so far as the same may be applicable."

And Whereas, there has been deposited in the General Land Office of the United States an order bearing date January
35 20, 1886, from the Secretary of the Interior, accompanied by a return dated October 30, 1884, from the office of Indian affairs with a list approved October 23, 1884, by the President of the United States showing the names of members of the Puyallup Band of Indians who have made selections of land in accordance with the provisions of the said treaties in which list the following tracts of land have been designated as the selection of Jake-Tai-ugh or Charley Jacobs, the head of a family, consisting of himself, Julia, Annie, Frank and Oscar, Viz:

The North East Quarter of the South West Quarter of Section one (40.00 acres) in township twenty north, the east half of the north west quarter and the north west quarter of the north east quarter of section thirty five (120.00 acres) in township twenty one north of range three east of the Willamette Meridian, Washington Territory, containing in the aggregate one hundred and sixty acres.

Now Know Ye, That the United States of America in consideration of the premises and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the 16th day of March, 1854, with the Omaha Indians has given and granted and by these presents does give and grant unto the said Jake-Tai-ugh or Charley Jacobs, as the head of the family as aforesaid, and to his heirs the tracts of land above described but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians that the said tracts shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture which conditions shall con-

tinue in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restriction" and "no State legislature shall remove the restriction" "without the consent of Congress."

To have and to hold the said tracts of land with the appurtenances unto the said Jake-Tai-ugh of Charley Jacobs as the head of the family as aforesaid, and to his heirs forever with the stipulation aforesaid.

In Testimony Whereof I, Grover Cleveland, President of the United States have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington this thirtieth day of January in the year of our Lord one thousand eight hundred and eighty six and of the Independence of the United States the one hundred and tenth.

[SEAL.] By the President, GROVER CLEVELAND,
By M. McKEAN, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded, Vol. 1, Page 56.

36 That the sixth article of the Treaty with the Omahas is as follows:

Article 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section to each family of two, one quarter section; to each family of three, and not exceeding five, one half section; to each family of six and not exceeding ten one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a state constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also with-old from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in

default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

On the 23rd day of September, 1889, Jake Tai-ugh or Charlie Jacobs and his wife, Julia Jacobs, made a contract with defendant, Jerry Meeker, which is as follows:

37 Do grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns for two years from the date hereof the following described premises, situate, lying and being in the County of King, Territory of Washington, to-wit:

The east half (E. ½) of the Northwest (N. W. ¼) quarter of section thirty-five (35) in township number twenty-one (21) north of range three (3) east of the Willamette Meridian, Washington Territory, containing eighty (80) acres of land, more or less.

This instrument and conveyance is continued in force after two years and is made absolute on the further consideration of Eighty-two Hundred ($8200.00) Dollars, which shall be due and payable by the grantee to the grantors under this instrument within ninety days after the approval hereinafter provided for, the intention being that this indenture is and shall be binding on the grantors herein their heirs, executors, administrators, assigns and legal representatives forever and that it conveys to the grantee herein his heirs, executors, administrators, assigns and legal representatives, forever, the hereinabove mentioned land and real estate and that the same is hereby granted, bargained, sold and conveyed by this instrument for all time, and this indenture shall operate as a deed of absolute conveyance in fee simple of said above described real estate and property by the grantors herein their heirs, executors, administrators, assigns, and legal representatives to the grantee herein his heirs, executors, administrators, assigns and legal representatives without any further writing upon approval of the same in accordance with the terms of article six of the Treaty of Omahas so far as the same may be applicable, said treaty bearing date March 16th, 1854.

To Have and to hold the said premises with their appurtenances unto the said party of the second part, his heirs and assigns, forever and we the said parties of the first part do hereby covenant to and with the said party of the second part his heirs and assigns that we are the owners in fee simple of said premises that they are free from all encumbrances and that we will Warrant and Defend the same from all lawful claims whatsoever.

Two Witnesses.

JAKE TAI-UGH OR CHARLEY his x mark JACOBS [SEAL.]

JULIA her x mark JACOBS. [SEAL.]

TERRITORY OF WASHINGTON,
County of Pierce, ss:

Acknowledged by Jake Tai-ugh or Charley Jacobs, and his wife, Julia Jacobs, (wife examined separate and apart from her husband) as their free and voluntary act and deed, before

[SEAL.] FRANK C. ROSS,
Notary Public in and for Washington Territory.

38 On March 3, 1893, Congress passed an act empowering the President of the United States to appoint a commission of three persons and defining the duties of said commission, which were, among other things, "to select and appraise such portions of the allotted land as are not required for homes for the Indian allottees, * * * and if the Secretary of the Interior shall approve the selections and appraisements made by said commission, the allotted land so selected shall be sold for the benefit of the allottees after due notice at public auction, at not less than the appraised value for cash, or one-third cash and the remainder on such time as the Secretary of the Interior may determine, to be secured by a vendor's lien on the property sold; to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money, and the whole amount received for the allotted land shall be placed in the treasury to the credit of the Indian entitled thereto, and the same shall be paid to him in such sums and at such times as the commissioner of Indian affairs, with the approval of the Secretary of the Interior, shall direct. * * * That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission, for a period of ten years from the date of the passage of this act, and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof, * * * The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions."

39 Under date of November 6, 1893, the Department of the Interior, approved by the acting Secretary, sent instructions to the commissioners appointed under the foregoing act, in which among other things, they instructed the commissioners to treat such agreements and sales as contained in the Meeker agreement, as absolutely null and void; to select and appraise such portions of the allotted lands as are not required for homes for the Indian allottees; "then to obtain from the Indian or Indians entitled to the same, a written agreement signed and executed in the proper man-

ner, consenting to the sale thereof at a sum not less than the appraisers' value and appointing and constituting you as commissioners, or a majority of you, trustees to sell said lands and make deed to the purchasers of the same. If Indian allottees or heads of families have died since the issuance of patents for lands selected and appraised for sale, you will determine the legal heirs of such allottees or head of family in accordance with the laws of the State of Washington; or, in other words, the true owners of the allotted lands, and have guardians duly appointed for the minor heirs of any deceased allottees, and obtain the consent of the heirs of twenty-one years and such guardians." The instruction also went on to require the commissioners to report all of their acts to the Interior Department for approval, and that upon approval other and further instructions would be given pertaining to the sale of lands and making deeds to the purchasers.

In 1895 the commissioners received further instructions from the Secretary of Interior, among other things, that the commissioners were not required "to go into the state courts in order to determine who are the heirs of these allottees. But, to themselves apply the rule prescribed in their instructions, and when the 'heir' or 'true owner' is so ascertained, to obtain his consent to the sale of his allotment in the manner provided by the act—that the President would have the right to prescribe rules for the descent of these lands. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.

The Secretary of the Interior is the officer charged by law with the management and control of Indian affairs. These allottees are still the wards of the nation and the Secretary of the Interior is the officer charged by law with the duties of guardianship." Under date of July 2, 1897, the Department of the Interior notified Clinton A. Snowden *the* he had been appointed Commissioner of Lands of the Indian Reservation under Act of June 7, 1897. This act was practically in all respects similar to the Act of March 3, 1893, except it provided for one commissioner instead of three. At the same time the Interior Department gave him instructions, among other things, as follows:

"It will be your duty to sell or offer for sale under previous instructions to the commission, the unsold allotted lands whose appraisements have been approved and sale authorized, and to obtain the written consents of sale, if possible to do so, of other Indian allottees and the members of their families. * * * When such schedules, written consent and appraisals shall have been received, they will be laid before the Secretary of the Interior for his consideration and approval. Upon approval of the appraisements and authorization of the sale of the lands you will be instructed to sell the same. * * * That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family. It is necessary to obtain the written consent of all the members of the family named in the patent. *That it is necessary to have legal guardians appointed for minors who are themselves*

allottees, but not minor heirs of deceased allottees. It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees."

On January 18, 1901, the Secretary of the Interior, in answer to an inquiry from Mr. Snowden, the Indian Commissioner, as to the status of a case where the original allottee, after consenting to the sale, had died leaving heirs who had not given consent, instructed the Commissioner, among other things, as follows:

"Where allottees and true owners of Puyallup lands have executed their consents of sale, the same having been approved by the Secretary, it has been the practice of the Department to continue the sale of the lands covered thereby in the case of the death of an allottee or true owner and to distribute the funds arising from such sale to his or her heirs. The office and the Department have regarded these written consents as remaining in full force and effect upon the decease of the Indian executing the same—and further, that they are, as above indicated, in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease. * * * These lands are sold under the pro-
41 visions of the Act of Congress, March 3, 1893, and not under the laws of the State of Washington. * * * It is for the Department to pass upon the sufficiency of consents and not the courts of the State of Washington."

That Julia, named in the patent, was the wife of Charley Jacobs Annie was his sister, Frank his son by a former wife, and Oscar his son by his wife Julia.

There is also Sam Johnny, a son of Julia by a former husband, not named in the patent; also Lillie, defendant in this action, a daughter of Charley and Julia, born in the year 1888 and not named in the patent; and Ruther, defendant in this action, a son of Charley and Julia, born in the year 1891 and not named in the patent.

Annie, named in the patent, died in the month of November, 1888, never having been married, leaving no father, mother, children, brothers or sisters, except Charley Jacobs who was her sole heir.

That on the 7th day of March, 1898, Charley Jacobs, Julia Jacobs, and Frank Jacobs, all of age and named in the patent, subscribed and acknowledged a written consent to Commissioner Snowden, appointing him trustee to sell the lands in controversy under the act of March 3, 1893.

42 Said written consent was in words and figures following:

Know all men by these presents: That we, the undersigned, Charley Jacobs, Julia Jacobs and Frank Jacobs of the Puyallup Indian Reservation, State of Washington, being the true owner- of the following described allotted lands in said Reservation, to-wit:

The N. E. /4 of S. W. /4 of Sec. 1, Tp. 20, N. R. 3 E. and the E. /2 of the N. W. /4 and the N. W. /4 of the N. E. /4 of Sec. 35, Tp. 21, N. R. 3 E. of W. M.

and justly entitled to the same under patent issued to ourselves and

heirs, hereby give our written consent to the sale of a portion of said tract, described as follows, towit:

The East half (E./2) of the North-west quarter (N. W./4) of Section thirty-five (35) Township twenty-one (21) north, range three (3) east of the Willamette Meridian, in King County, Washington at a sum not less than the appraised value, $50.00 per acre; and we do hereby make, constitute and appoint Clinton A. Snowden, of Tacoma, Washington, or his successor, as Commissioner of Puyallup lands appointed in pursuance of a provision contained in the act of June 7, 1897, (30 Stats., 62) making appropriation for the Indian service for the fiscal year 1898, trustee to sell the land so appraised under said act and the act of March 3, 1893, (27 Stats., 612), at not less than the appraised value for cash, or one-third cash, and the remainder on such terms as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold, and make deeds to the purchasers thereof, subject to the approval of the Secretary of the Interior which deeds shall operate as complete conveyances of the land upon full payment of the purchase money; and the said Commissioner, or his successor, is authorized hereby to do and perform all the necessary acts in the execution and prosecution of the aforesaid business, and in as full and ample a manner as I might do if we — personally present.

In witness whereof, we have hereunto set our hands this seventh day of March, 1898.

his
CHARLEY x JACOBS.
mark.

her
JULIA x JACOBS.
mark.

FRANK JACOBS.

Attest:
T. B. WILSON.
JERRY MEEKER.

STATE OF WASHINGTON,
County of Pierce, ss:

I, E. D. Wilcox, a Notary Public, do hereby certify that on this seventh day of March, 1898, personally appeared before me Charley Jacobs and Julia Jacobs, his wife, and Frank Jacobs, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the
43 same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] E. D. WILCOX,
Notary Public, Residing at Tacoma, Wash.

That on the 29th of August, 1898, Charley Jacobs, as guardian of Oscar Jacobs named in the patent, having been previously ap-

pointed guardian by the Superior Court of the State of Washington for Pierce County, signed and acknowledged a similar consent and appointment of Mr. Snowden as trustee to sell said lands, and on October 7, 1898, he, as the sole heir of Annie named in the patent, signed and acknowledged a similar consent and appointment of Mr. Snowden as trustee to sell said lands, said written consents and appointments as trustee being in the same form as that above set forth, and each acknowledged before the same Notary, Mr. Wilcox.

These consents, with the appraisement and other papers, were then transmitted by Mr. Snowden to the Secretary of the Interior; that they were thereafter on the 20th day of February, 1899, approved by the Secretary of the Interior, and Mr. Snowden, on February 27, 1901, offered these premises for sale at public auction and they were purchased by A. G. Prichard, Trustee, for $1250.00, he paying $420.00 in cash, the remainder to be paid in five equal payments, to-wit: On or before February 27th in each of the years 1902, 1903, 1904, 1905 and 1906, at six per cent. per annum; and Mr. Snowden then executed and delivered to him a deed for the same which is as follows:

Commissioner's Deed.

STATE OF WASHINGTON,
County of Pierce, ss:

Whereas, by virtue of the power vested in the President of the United States, by the Act of Congress approved March third, eighteen hundred and ninety three (27 Stat., 612), "for making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety four, commissioners were appointed by the President of the United
44 States to select, appraise, and sell such portions of the allotted lands as are not required for homes for the Indians allottees, and also "that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington;" and

Whereas, the undersigned was appointed a Commissioner for Puyallup lands under the Indian appropriation act, approved June seventh, eighteen hundred and ninety-seven (30 Stat., 62); and

Whereas, the written consent has been obtained from Charley Jacobs, allottee, and heir of Annie, his si-ter (deceased), Julia Jacobs, Frank Jacobs, and Oscar Jacobs, by his guardian, Charley Jacobs, Indian allottees, consenting to the selection and sale of the hereinafter-described lands, as their allotment #3, and appointing the undersigned commissioner Trustee to sell said lands and make a deed to the purchaser thereof; and

Whereas, the said land, as the allotment not required as the home for said Indians, was selected and appraised, and the same was duly approved by the Secretary of the Interior, and offered for sale at public auction, after due notice thereof, at Tacoma, on the Twenty-seventh day of February, nineteen hundred and one, and was

knocked off to A. G. Prichard Trustee, Tacoma, Washington he being the highest and best bidder;

Now, therefore, I, the undersigned, Commissioner of the United States, and Trustee for said Indians, hereinbefore named, do, by virtue of the power and authority vested in me by the Acts of Congress aforesaid hereby sell, convey, and transfer the following described real estate:

The east-half (E. ½) and East-half (E. ½) of East-half (E. ½) of west-half (W. ½) of North-east Quarter (N. E. ¼) of North-west quarter (N. W. ¼) of Section Thrity-five (35) Township Twenty-one (21) North, Range Three (3) East of W. M. in King County, Washington, containing Twenty-five (25) acres, more or less, according to government survey.

unto A. G. Prichard Trustee said purchaser, as aforesaid, for and in consideration of the sum of One thousand two hundred and fifty no/100 dollars ($1250.00) Four hundred and twenty no/100 dollars ($420.00) of which amount has been paid in cash, and one-fifth of the remainder is to be paid on or before the 27th of February, nineteen hundred and Two; one-fifth on or before the 27th day of February, nineteen hundred and Three; one-fifth on or before the 27th day of February, nineteen hundred and Four; one-fifth on or before the 27th day of February, nineteen hundred and five, and the other remaining one-fifth on or before the 27th day of February, nineteen hundred and six.

Each of such deferred payments to bear interest at the rate of six per centum per annum from the date of sale of the lands hereby conveyed to the date of payment thereof.

This deed shall operate as a complete conveyance of the land herein described upon full payment of the purchase money, evidenced hereon by some officer or agent of the United States Government duly authorized by the Secretary of the Interior to collect the deferred payments.

In witness whereof, I have hereunto set my hand and affixed my seal this 27th day of February, nineteen hundred and one.

C. A. SNOWDEN, [SEAL.]
Trustee and Commissioner.

45

Signed, sealed, and delivered in the presence of:

CHAS. BEDFORD,
HENRY A. YOUNG,
Witnesses.

STATE OF WASHINGTON,
County of Pierce, ss:

On this 14th day of March 1901, personally appeared before me, Chas. Bedford, a Notary Public in and for said County and State, Clinton A. Snowden, Commissioner and Trustee, known to me to be the party signing the above instrument, and acknowledging that as such Commissioner and Trustee, he signed and executed the same

on the day and date first above written, for the purposes and uses therein expressed and set forth.

[NOTARIAL SEAL.] CHAS. BEDFORD,
Notary Public, Residing at Tacoma, Washington.

Department of the Interior, April 22, 1901.

Approved:

THOS. RYAN,
Act'g Secretary.

That said deed was thereafter on April 25, 1901, recorded in the office of Indian Affairs, Land Division, Puyallup Deed Book, alloted lands, Volume 2, page 48, and was thereafter on the 17th day of March, 1903, recorded in the Auditor's Office of Pierce County, Washington, in Book 208 of Deeds at page 113.

That at the time of making said purchase plaintiff herein paid the cash payment of $420.00, and thereafter on the 27th of February, 1902, paid the first yearly payment of $175.95, and that prior to the commencement of this action he paid to the proper United States authorities all the payments agreed upon in said Commissioner's deed, and the same have been received and accepted by the Interior Department for distribution to those entitled to the same, including defendants, Ruther Jacobs and Lillie Jacobs. But their guardian, E. D. Wilcox, has not received the same and now refuses to accept the same, except the cash payment of $420 and the 1902 payment of $175.96.

That Charley Jacobs died January 26, 1900, and the following were left surviving him: His wife, Julia Jacobs, named in the patent, his son by a former marriage, Frank Jacobs, named in the patent, his son by his wife Julia, Oscar Jacobs, named in the patent,
46 his daughter, Lillie Jacobs, born after the patent was issued and not named in the patent, his son, Ruther Jacobs, born after the patent was issued and not named in the patent, and Sam Johnny son of Julia Jacobs by a former husband. That his death was reported to the Commissioner of Indian *Aff* Affairs by C. A. Snowden on May 1, 1900, that Julia died about September 30, 1900. That Frank, Oscar, Lillie, Ruther and Sam are all the heirs of Charlie and Julia and each of them.

Defendant, E. D. Wilcox, was appointed by proper proceedings in this court guardian of Lillie Jacobs and Ruther Jacobs on the 6th day of February, 1901, and he, in his various reports as guardian, has reported to this court that the east half of the northwest quarter of Section thirty-five, Township twenty-one, north, Range three east of the Willamette Meridian (which includes the premises in question) had been sold by the Indian Commissioner, and that he, as guardian has received the money from the United States as the proceeds of the sale of said property so sold by the Indian Commissioner. That he, as guardian, has received for his said wards and applied to their use the portion allotted by the Secretary of the Interior to his wards, both of the cash payment of $420.00 made by

plaintiff at the date of his purchase, and of the February 27th, 1902, payment of $175.96 made by plaintiff.

That said E. D. Wilcox did not know at the time he received the moneys from the United States for his wards, Lillie Jacobs and Ruther Jacobs, that the sale made by Commissioner Snowden was subsequent to the death of Charley Jacobs; that the matter had never been called to his attention and he had made no investigation in that regard, and he did not discover that fact until after the commencement of this suit; that as soon as he discovered that fact he refused to accept any further money from the United States as the proceeds of the sale of said lands, and that prior to the trial of this action, Lillie Jacobs, tendered to the plaintiff $148.99, being the amount that she received from the United States government as the proceeds of the Commissioner's sale of said lands, and demanded of plaintiff a deed of quit claim as to her interest. And at
47 the same time E. D. Wilcox as guardian of Ruther Jacobs, tendered to plaintiff a similar amount being the amount received by him as guardian for said ward from the United States government as the proceeds of said Commissioner's sale of said lands, and made similar demand for a quit claim deed.

That said guardian, E. D. Wilcox, is the same E. D. Wilcox who acted as Notary in taking the acknowledgments to the written consents above referred to, but he was not guardian at that time and only acted in the capacity of Notary, and he had no knowledge in regard to the rights of Ruther Jacobs and Lillie Jacobs.

That at the time plaintiff herein purchased the premises from Mr. Snowden acting as Indian Commissioner he had not been advised and had at no time until shortly prior to bringing this action any knowledge whatever of the death of Charley Jacobs and Julia Jacobs, or of the existence of Lillie Jacobs or Ruther Jacobs, or that any one other than those named in the patent and whose consents for sale had been given to Mr. Snowden claimed any interest in the premises; that plaintiff purchased the premises in good faith and paid a fair consideration for the same; that he made no inquiry or investigation of the facts of Charley Jacob's death or Julia Jacob's death, at or before his purchase aforesaid, and made no investigation in regard to their heirs or the members of their family; that he relied wholly upon the representations of Commissioner Snowden and in full belief of the regularity of his proceedings.

That the Department of the Interior of the United States of America has had this matter submitted to it for a decision and interpretation and said Department of the Interior has made the following decision and interpretation:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *February* 19, 1906.

Messrs. Ellis & Fletcher, Attorneys at Law, Fidelity Building, Tacoma, Washington.

GENTLEMEN: I acknowledge the receipt of your communication of the 2nd instant, relative to the sale, by the Puyallup Commissioner, of certain land belonging to the Jacobs family to Mr.

Prichard, your client, and asking the opinion of this De-
48 partment in the matter.

In response, I transmit herewith, a copy of a report on the subject from the Acting Commissioner of Indian Affairs, dated the 15th instant, in which the views of his Office as to the correctness of the action of the Puyallup Commissioner and the authority upon which the Department's instructions to his were based, are fully set forth.

The views of the Indian Office are concurred in by the Department.

Very respectfully,

THOS. RYAN,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *February* 15, 1906.

The Honorable The Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt, by Departmental reference for report of a communication of the 2nd instant from Ellis & Fletcher, attorneys at law, Tacoma, Washington, saying that a client of theirs who purchased property from Clinton A. Snowden, as trustee for the Puyallup Indians, the sale being had pursuant to the Act of March 3, 1893, (27 Stat., 633), finds the following situation

1. That the patent was issued to Jake Tai-ugh or Charley Jacobs, the head of a family consisting of himself, Julia, his wife, Annie his sister, Frank, a son by a former wife, and Oscar, a son by his wife Julia.

2. That some years after the patent was issued two other children were born to Charley and Julia, to-wit: Lillie and Ruther; that Annie died in November, 1888, never having married, leaving no father, mother, children, brothers or sisters except Charley Jacobs; that he was afterwards appointed guardian for his minor son, Oscar, named in the patent.

3. That on March 7, 1898, Charley Julia, and Frank, the latter being of age, signed a written consent under the forms of this Department, authorizing Mr. Snowden, as Puyallup Commissioner to sell the premises in question; that on August 29, 1898, Charley Jacobs signed a similar consent as guardian for Oscar, a minor (Supra), he having been appointed by the probate court of Pierce county, Washington, as the guardian of this minor; that on October 7, 1898, Charley signed a similar consent as the sole heir of his sister Annie; that these consents and the schedule and other proper papers were thereafter forwarded by Mr. Snowden to this office, and that they were approved by the Department on February 20, 1899.

4. That Charley Jacobs, the original head of the family, died January 26, 1900, leaving Julia, Frank, and Oscar (all named in the patent) and Lillie and Ruther (born after the patent was issued

and not named therein) surviving him; that no guardian was then appointed for Lillie and Ruther.

49 5. That without getting any further consents, notwithstanding the death of Charley Jacobs, the Puyallup Commissioner, acted upon the original consents and the approval of this Department, sold the premises in question on February 27, 1901; that they were purchased by a man named Prichard, their client, who now has the Commissioner's deed for the land sold, having made all deferred payments thereon.

6. That some time after the sale a guardian was appointed for Lillie and Ruther; that he received for them as guardian, the cash payment and the payment for 1902; that the balance of the payments were made in January of this year; that the guardian has refused to accept any portion of them and now claims that the sale was void as to his wards, and that they are the owners of a one-eighth interest each.

7. That they find from the records in the Puyallup Commissioner's Office, instructions from this office to the effect that after consents had been given and approved by the Department the sale should continue on the theory, they presume, that the Government still having a supervisory interest in the lands, such consents are irrevocable, at least, are not revoked by the death of the owner so consenting.

They ask you to give them your opinion respecting this matter and cite them to any authorities on which you based your instructions to the Puyallup Commissioner.

In reporting on this subject, I have the honor to invite attention to Office report of October 3, 1895, transmitting one from the Puyallup Commissioners of August 28, that year, in which they said that in several instances Indians who had given their consent to the sale of parts of their allotted lands, had revoked or attempted to revoke the consent given, for certain reasons.

The office said that in view of the fact that the Puyallup lands were under the control of the Government, that Congress had authorized their disposal on certain terms, conditions, stipulations, and restrictions; that the Indians had consented in the manner provided by law to the sale of a part of their respective allotted lands; that they had been appraised by the Puyallup Commissioners, and the appraisement approved by the Department, and sales thereof authorized, it was clearly of the opinion that Indians who had given their written consent in the manner and for the purpose stated, could not revoke or annul them without the consent and authority of this Department, and in Consideration of the premises it recommended that the Commissioners should be instructed to proceed with the sale of such lands in accordance with former instructions from the Department.

On October 17, 1895, the Secretary of the Interior said that the consents of the Indians referred to were obtained by the mode prescribed by the law providing for the sale of their lands, and that having thus regularly given their consent, he was of the opinion that they could not legally withdraw it except for some good and

valid reason, which did not appear to be the case with those then in question; that if the lands which these Indians had authorized to be sold, or parts of them, were necessary for their maintenance, or had been appraised at less than their market value, or at less valuation than they were willing to take for them, then their objections to the sale could be removed by the Commission by offering smaller parts of their allotments for sale, or by a reappraisement to meet the views of the allottees.

The Office and the Department have uniformly held that the death of an allottee did not revoke his written consent of sale; that such consent was something more than a mere power of attorney; that it was in the nature of a trust, to be carried out in case of his death, for the benefit of his legal heirs. The Puyallup Commission was made a trustee by the respective written consents executed by the allottees and true owners of Puyallup allotted lands, to sell and convey the lands for which consent of sale had been given. Such written consents were regarded as in the nature of a written agreement of contract, whose terms and conditions should not be allowed to fail of performance or execution by reason of the death of the Indian allottee or true owner. The provisions of the Puyallup Act (Supra) appear to be sufficient to justify the course which the Department has taken in this matter, to which special attention is invited, and to convey good title to lands sold thereunder.

The letter of the said attorneys is returned herewith.

A copy of this report is enclosed.

Very respectfully,

C. F. LARRABEE.
Acting Commissioner.

That the defendants, Lillie Jacobs and Ruther Jacobs, had no knowledge of the giving of said consents and of the various communications and instructions given by the Secretary of the Interior to the Puyallup Commissioner as first constituted, or to C. A. Snowden, Puyallup Commissioner, or of any rulings or interpretations made by the Department of the Interior as set forth in the foregoing statement of facts, and were not parties to any proceedings in which any such rulings or interpretataions were made.

That it was the custom and practice of the Puyallup Commissioner, where the Indians had given their consent to the sale of land and then changed their mind and did not want to sell, not to offer the land for sale.

That the land in controversy was worth and could have been sold for $25,000.00 at the time of the commencement of this action, and is worth that amount at this time. That Lis Pendens was filed at the time of the commencement of this action, in compliance with law.

E. D. WILCOX &
IRA A. TOWN,
Att'ys for Ruther & Lillie Jacobs &
E. D. Wilcox as Guardian.

51 In the Superior Court of Pierce County, State of Washington.

No. —.

A. G. PRICHARD, Trustee, Plaintiff,
vs.
JERRY MEEKER et al., Defendants.

Certificate to Statement — Facts.

I, the undersigned, Thad Huston, Judge of said Court who presided upon the trial of said cause, and who rendered judgment and decree therein, do hereby certify and declare that the matters and proceedings embodied and set forth in the annexed and foregoing Statement of facts, are matters and proceedings that occurred in said cause and the trial thereof, and the same are hereby made a part of the Record herein. And I hereby further certify and declare that said statement of facts contains all the evidence, and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record therein.

Witness my hand this 20th day of Sept., 1906.

THAD HUSTON, *Judge.*

Received copy of foregoing Sept. 1, 1906.

ELLIS & FLETCHER,
Att'ys for Pl'ff.

Endorsed: Filed in Superior Court Sep. 1, 1906. A. M. Banks, Clerk. By Peter David, Deputy.

52 Filed July 9th, 1907.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
v.
RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of Ruther Jacobs, Appellants.

This is a suit to quiet title to land. All the defendants made default except Ruther Jacobs and Lillie Jacobs, and E. D. Wilcox as their guardian. The cause was tried upon an agreed statement of facts, from which we gather the following extended and somewhat complicated chain of facts: The land lies in the Puyallup Indian reservation, and was allotted or patented by the United States, on the 30th day of January, 1886, to Charley Jacobs, the head of a family, and to other members thereof who will be hereinafter mentioned. These were all Puyallup Indians, and said allotment or patent was

subject to the stipulations and conditions contained in Art. 6 of the treaty of the United States with the Omaha Indians. That provision empowered the president to cause allotments to be made from reserved lands to such Indians as were willing to avail themselves of the privilege, and who would locate on the same as a permanent home. On March 3, 1893, congress passed an act empowering the president to appoint a commission of three persons and defined the duties of the commission, which among other things were to select and appraise such portions of the allotted lands as were not required for homes for the Indian allottees to sell the same for the benefit of the allottees at public auction after due notice, to superintend the sales, ascertain who are the true owners of the allotted lands, make deeds to the purchasers subject to the approval of the secretary of the interior, the amount received for the lands to be placed in the treasury to the credit of the Indian entitled thereto, the same to be paid to him in such sums and at such times as the commissioner of Indian affairs, with the approval of the secretary of the in-
53 terior, shall direct. No part of the allotted lands shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell the land and to make a deed to the purchaser thereof, the deeds not to be valid until approved by the secretary of the interior who is directed to make all necessary regulations to carry out said provisions.

On November 6, 1893, the department of the interior instructed the commissioners, who were appointed in pursuance of the act of congress aforesaid, to appraise the allotted lands not required for homes for the Indians, to obtain written agreements from the allottees consenting to the sale of lands at sums not less than the appraiser's value, and appointing and constituting the commissioners trustees to sell the lands and make deeds to purchasers, to determine according to the laws of the state of Washington the legal heirs of allottees or heads of families who have died since the issuance of patents for lands selected and appraised for sale, to have guardians appointed for the minor heirs of deceased allottees, and to obtain the consent of the heirs of twenty-one years and of such guardians. The commissioners were instructed to report to the department of the interior for approval, and that upon approval further instructions would be given appertaining to the sale of the lands and making deeds to the purchasers. In 1895 the commissioners received further instructions, among other things to the effect, that they were not required to go into the state courts in order to determine who are the heirs of these allottees, but that they themselves should apply the rule prescribed in their instructions, and when the heir or true owner is so ascertained they should obtain his consent to the sale of his allotment; that the president has the right to prescribe rules for the descent of these lands; that the president speaks and acts through the heads of the several departments in relation to the subjects which appertain to their respective duties; that the secre-

tary of the interior is the officer charged by law with the
54 management and control of Indian affairs; that the allottees are still the wards of the nation, and the secretary of the interior is the officer charged by law with the duties of guardianship.

Under date of July 2, 1897, the department of the interior notified Clinton A. Snowdon that he had been appointed commissioner of lands of the Indian reservation, under the act of June 7, 1897. This act was practically in all respects similar to the act of March 3, 1893, except that it provided for one commissioner instead of three. At the same time the interior department gave him instructions, among other things, as follows:

"It will be your duty to sell or offer for sale under previous instructions to the commission, the unsold allotted lands whose appraisements have been approved and sale authorized, and to obtain the written consents of sale, if possible to do so, of other Indian allottees and the members of their families. * * * When such schedules, written consents and appraisals shall have been received, they will be laid before the secretary of the interior for his consideration and approval. Upon approval of the appraisements and authorization of the sale of the lands you will be instructed to sell the same. * * * That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family. It is necessary to obtain the written consent of all the members of the family named in the patent. That it is necessary to have legal guardians appointed for minors who are themselves allottees, but not minor heirs of deceased allottees. It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees."

The allottees named in the patent for the lands in controversy and their relation to each other were as follows: Charley Jacobs, the head of the family; Julia, his wife; Annie, his sister; Frank, his son by a former marriage, and Oscar, his son by his wife Julia. The answering defendants Lillie and Ruther Jacobs are the children of said Charley and Julia, and were born after the issuance of the patent, Lillie in the year 1888, and Ruther in 1891. There is also living Sam Johnny, a son of Julia by a former husband, not named in the patent. Annie, named in the patent, died in the month of November, 1888, never having been married, leaving no father, mother, children, brothers, or sisters, except Charley Jacobs, who was her sole heir. On the 7th day of March, 1898, Charley, Julia, and Frank, all of age and named in the patent, subscribed and acknowledged a written consent to Commissioner Snowdon, appoint-
55 ing him trustee to sell the lands in controversy here, under the act of March 3, 1893. On August 29, 1898, Charley Jacobs, as guardian of Oscar Jacobs, named in the patent, having been previously duly appointed such guardian, signed and acknowledged a similar consent, and on October 7, 1898, he, as sole heir of Annie, named in the patent, signed and acknowledged a similar con-

sent. These consents with the appraisement and other papers were then transmitted by Mr. Snowdon to the secretary of the interior, and were by the latter approved February 20, 1899. On February 27, 1901, Mr. Snowdon offered the preimses for sale at public auction, and they were purchased by the plaintiff in this action, for $1,250, he paying $420 in cash, the remainder to be paid in five equal payments, to wit, on or before February 27 in each of the next succeeding five years, with interest at six per cent. per annum. Mr. Snowdon then executed and delivered to this plaintiff as such purchaser a deed for the land. The deed recited that it should operate as a complete conveyance of the land upon full payment of the purchase money, the terms for payment being also specified. Prior to the commencement of this suit the plaintiff paid to the proper United States authorities all the payments agreed upon in said commissioner's deed, and the same have been received and accepted by the interior department for distribution to those entitled to the same.

Prior to the making of said sale and conveyance, said Charley Jacobs died, on January 26, 1900, and left surviving him his wife, Julia, his sons Frank and Oscar, all named in the patent; also his daughter Lillie, and his son Ruther, both of whom were born after the patent was issued and were, of course, not named in the patent; and also the said son of Julia by a former husband, Sam Johnny, not named in the patent. The death of Charley was reported to the commissioner of Indian affairs by Mr. Snowdon on May 1, 1900. Julia also died about September 30, 1900. On February 6, 1901, the defendant Wilcox was duly appointed guardian of Lillie and Ruther. After the deaths aforesaid and before the sale was made, the secretary of the interior, on January 18, 1901, in answer
56 to an inquiry from Mr. Snowdon, the Indian Commissioner, as to the status of a case where the original allottee, after consenting to the sale, had died leaving heirs who had not given consent, instructed the commissioner among other things as follows:

"Where allottees and true owners of Puyallup lands have executed their consents of sale, the same having been approved by the secretary, it has been the practice of the department to continue the sale of the lands covered thereby in the case of the death of an allottee or true owner and to distribute the funds arising from such sale to his or her heirs. The office and the department have regarded these written consents as remaining in full force and effect upon the decease of the Indian executing the same—and further, that they are, as above indicated, in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease. * * * These lands are sold under the provisions of the Act of Congress, March 3, 1893, and not under the laws of the state of Washington. * * * It is for the department to pass upon the sufficiency of consents and not the courts of the state of Washington."

The defendant Wilcox, in his various reports as guardian, has reported that the land in question was sold by the Indian commissioner, and that he as guardian has received from the United States,

as the proceeds of such sale, a portion of the shares allotted by the secretary of the interior to his wards, as heirs of said deceased persons. The said guardian, however, did not know at the time he received the money that the sale was made by the commissioner after the death of Charley and Julia. When he discovered that fact he refused to accept any further money from the United States as the proceeds of such sale, and prior to the trial of this action the return of the money so received was tendered to the plaintiff, and was by him refused. At the time the plaintiff purchased the premises he had not been advised of the death of Charley and Julia, and at no time until a short time before bringing this action did he acquire such knowledge or learn of the existence of Lillie or Ruther, or that any one other than those named in the patent and whose consents for sale had been duly given claimed any interest in the land. He purchased the land in good faith, and relied upon the representations of the commissioner and in full belief of the regularity of his proceedings. The price paid was the full value of the land at the time of the sale, but at the time this suit was brought it was worth, and is now worth, $25,000.

57 The above facts were submitted to the department of the interior for a decision and interpretation and, among other things, that department, in February, 1906, held and announced as follows:

"The office and the department have uniformly held that the death of an allottee did not revoke his written consent of sale; that such consent was something more than a mere power of attorney; that it was in the nature of a trust, to be carried out in case of his death, for the benefit of his legal heirs. The Puyallup Commission was made a trustee by the respective written consents executed by the allottees and true owners of Puyallup allotted lands, to sell and convey the lands for which consent of sale had been given. Such written consents were regarded as in the nature of a written agreement of contract, whose terms and conditions should not be allowed to fail of performance or execution by reason of the death of the Indian allottee or true owner. The provisions of the Puyallup Act (supra) appear to be sufficient to justify the course which the department has taken in this matter, to which special attention is invited, and to convey good title to lands sold thereunder."

Upon all the foregoing facts the court held that the plaintiff is the owner in fee simple of the premises in controversy; that the defendants have no interest therein, and that plaintiff's title should be quieted. Decree was entered accordingly, and Lillie and Ruther Jacobs and their guardian Wilcox, being the only answering defendants, have appealed.

The appellants to some extent discuss the nature of the estate taken by the grantees of the patent from the United States. Respondent concedes that they took a base or qualified fee simple title subject to temporary restrictions on the right of alienation, as held by this court concerning a similar patent in Guyatt v. Kautz, 41 Wash. 115. It is also conceded that the appellants, as heirs of the deceased allottees, are entitled to their proportionate part of the proceeds of the sale. The essential question for determination is,

what was the nature and effect of the written consent executed by the allottees and appointing the Indian commissioner to sell the lands in controversy. If that consent was sufficient authority for the sale, then the judgment of the trial court was right, inasmuch as the respondent as purchaser and the Indian commissioner and officers of the interior department in all things appear to have acted in good faith, and no fraud or collusion was practiced. The government was the voluntary donor of these lands, and as such it had the power to place such restrictions upon the grant as it saw fit.

58 Smythe v. Henry, 41 Fed. 705;
Eells v. Ross, 64 Fed. 417.

Exercising that power, the patent issued for these lands absolutely prohibited alienation for a longer term than two years. The power to authorize further exercise of the right of alienation was expressly prohibited even to the legislature of the future state, without consent of Congress. The ultimate power to confer the right of full alienation was reserved by the government in the grant itself, which, as we have seen, was made in 1886. In pursuance of this reserved power, Congress afterwards passed the aforesaid act of 1893, conferring the full power of alienation and prescribing the method of its exercise. As we understand the facts in this case, the method of alienation prescribed by Congress has been pursued, unless by reason of the death of Charley and Julia Jacobs, the conveyance was ineffectual. The initiatory step toward alienation prescribed by the act of Congress was the written consent of the allottees. With that existing, the further details of conveyances rested with the Indian commissioner and department of the interior as prescribed. As we have seen, the written consent of all the allottees named in this patent was duly executed and delivered to the commissioner. Annie, the sister of Charley, had died before the consent was given, but Charley as her sole heir executed the consent. It is argued by appellants that the written consent had no further force than that of an ordinary naked power of attorney, and that inasmuch as Charley and Julia died after the consent was given and before the sale was made, the power was thereby annulled and the sale rendered void. The words "power of attorney" are not used in the act of Congress prescribing this method of alienation. The office of a power of attorney is well understood. If a mere power revocable at will or by death was what was intended, it would seem that the agreement for alienation would have been so defined. We think it manifest from the act itself that such was not intended.

59 It plainly appears that the government recognized the fact that it had reserved the power to act as trustee for the Indians, so far as alienation was concerned, notwithstanding the allotment in severalty. The statute requires but one consent from an allottee, and it does not in terms require that when an allottee dies after consent is given and before sale, that his heirs must also consent. It empowers the commissioner to procure the appointment of guardians for minor heirs of deceased allottees, but that is manifestly for the purpose of effecting a proper distribution of the proceeds of a sale made in pursuance of a consent once duly

given by the allottee himself. We think the consent intended by the act of Congress is in the nature of a contract to be carried out through the department of the interior for the benefit of the allottee and his heirs. The consent invokes as a finality the exercise of the reserved trust held by the government, and when given it is not revocable by death of the allottee, but continues in force as an incident to the exercise of the power reserved by the patent itself to the government. The government discharges this trust by completing the alienation of the lands as agreed by the allottees, and then distributes the proceeds to the allottees or their heirs, if the allottees have in the mean time died.

As a matter of original construction the act of Congress is easily susceptible of the above interpretation, and to us it seems to be a reasonable interpretation. We have also seen from the recital of the facts considered by the trial court that the department of the interior has in all its dealings with the Indians so construed the law. It is the general rule that, when a statute entrusts the carrying out of its provisions to the executive department, its interpretation by that department will be followed by the courts, unless there are cogent reasons to the contrary.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

United States v. Moore, 95 U. S. 760.

60 The above statement embodies in a brief way the substance of the expressions of many courts whose opinions might be cited, and which are cited in respondent's brief. Their citation here, however, seems unnecessary, for the reason that this court has already several times applied the said rule of construction and recognized the wholesomeness thereof.

McSorley v. Hill, 2 Wash. 638;
Keane v. Brygger, 3 Wash. 338;
Blair v. Brown, 17 Wash. 570;
State ex rel. Smith v. Ross, 42 Wash. 439.

Having in view our own construction as above set forth, and particularly in view of the construction placed upon the statute by the executive department, charged with carrying out its terms, we think the sale made by the Indian commissioner was duly authorized. It follows that the respondent's title should be quieted as against appellants.

The judgment is affirmed.

HADLEY, *C. J.*

We concur:
DUNBAR, *J.*
RUDKIN, *J.*
FULLERTON, *J.*
MOUNT, *J.*
GOW, *J.*
ROOT, *J.*

61 In the Supreme Court of the State of Washington, Friday, October 11th, 1907.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
vs.
RUTHER JACOBS et al., Appellants.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Pierce County, and upon argument of counsel, and the Court having fully considered the same, and being duly advised in the premises, and having filed its opinion in writing, it is now, on this 11th day of October, A. D. 1907, on motion of Ellis & Fletcher, of counsel for respondent, considered, adjudged, and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; the petition for rehearing denied and that the said A. G. Prichard, Trustee have and recover of and from the said Ruther Jacobs, Lillie Jacobs and E. D. Wilcox as Guardian of Ruther Jacobs and from the National Surety Co. surety the costs of this action taxed and allowed at Sixty & 75/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance with the opinion herein filed.

62 In the Supreme Court of the State of Washington.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
vs.
JERRY MEEKER et al., Defendants; RUTHER JACOBS et al., Appellants.

Petition for Writ of Error.

To the Hon. Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington:

On this 19th day of May, 1909, Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, Appellants, in the above entitled action, by their attorney, E. D. Wilcox, represents to this Honorable Court and petitions as follows:

Your petitioners respectfully show that on the 11th day of October, 1907, a final judgment was made and entered by the Supreme Court of the State of Washington in the above entitled cause; that said court is the highest court in the State of Washington, in which a decision in said suit could be had; that in said case petitioners, appellants in said cause, set up and claimed title to the

land in controversy under and by virtue of a treaty entered into by the United States with the Puyallup and other allied bands and tribes of Indians, (10 Sts. at L. p. 1132) and a grant or patent issued by the United States, pursuant to said treaty; that said decision of the Supreme Court of the State of Washington is against the title, right and privilege so specially set up and claimed by the petitioners; petitioners consider themselves aggrieved by the decision so rendered and made and the final judgment so made and entered by said Supreme Court, for the reasons specified in
63 the assignment of errors filed herewith, and petitioners pray for the allowance of a writ of Error to remove said cause to the Supreme Court of the United States.

E. D. WILCOX,
Attorney for Appellants Ruther Jacobs, Littlie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs.

Endorsed: A. G. Prichard, Trustee, vs. Ruther Jacobs et al. Petition for Writ of Error. Filed May 19, 1909. C. S. Reinhart, Clerk.

64 In the Supreme Court of the State of Washington.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
vs.
JERRY MEEKER et al., Defendants; RUTHER JACOBS et al., Appellants.

Order Allowing Writ of Error.

Upon reading the petition of Ruther and Lilly Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, appellants in the above entitled cause, for the allowance of a writ of error to remove said case to the Supreme Court of the United States;

It appearing to my satisfaction that on the 11th day of October 1907, a final judgment was made and entered by the Supreme Court of the State of Washington, in the above cause; that the said court is the highest court of the State of Washington in which a decision in said suit could be had; that in said cause petitioners, and appellants in said cause, specially set up and claim title to the land in controversy under a treaty entered into by the United States with the Puyallup and allied bands and tribes of Indians, and a grant or patent issued by the United States in pursuance to said treaty, and that the decision in said Supreme Court of the State of Washington is against the title, right and privilege so specially set up and claimed and petitioners having filed in said court their petition and assignment of error and a prayer for reversal;

It is Ordered, that the Writ of Error to remove said cause to the Supreme Court of the United States issue, and that in said writ Ruther Jacobs, Little Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, shall be named Plaintiffs in Error and A. G. Prichard,

Trustee, shall be named as Defendant in Error. Citation will
65 be signed upon Plaintiffs in Error filing bond in the sum of One Thousand Dollars, conditioned that they will prosecute their writ to effect, and if they fail to make their plea good shall answer costs. Said writ not to be a supersedeas.

Dated at Olympia, Washington, this 19th day of May 1909.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Endorsed: A. G. Prichard, Trustee, vs. Ruther Jacobs, et al. Order Allowing Writ of Error. Filed May 19 1909, C. S. Reinhart, Clerk.

66 In the Supreme Court of the State of Washington.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
vs.
JERRY MEEKER et al., Defendants; RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of Ruther Jacobs, Appellants.

Bond.

Know all Men by these Presents, That Lillie Jacobs, Ruther Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, all of Pierce County, Washington, as principals, and National Surety Company, a corporation, authorized to transact business of surety in the State of Washington, as surety, are held and firmly bound unto A. G. Prichard, Trustee, and unto his successors, administrators and assigns, in the sum of One thousand Dollars, to be paid to the said A. G. Prichard, Trustee, his successors, administrators or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 19th day of May 1909.

Whereas, lately in a suit wherein A. G. Prichard, Trustee, was respondent and Lilly Jacobs, and Ruther Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, were appellants, judgment was rendered against said appellants, and the said appellants having procured a writ of error to the Supreme Court of the United States, to reverse the judgment aforesaid, and a citation having issued directed to the said A. G. Prichard, Trustee, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington.

Now therefore, the condition of this obligation is such that
67 if the above named appellants shall prosecute said writ to effect and answer all costs and damages, if they shall fail to

make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

RUTHER JACOBS,
By E. D. WILCOX, *Guardian.* [SEAL.]
LILLY JACOBS,
By E. D. WILCOX, *Attorney.* [SEAL.]
E. D. WILCOX, [SEAL.]
As Guardian of Ruther Jacobs.

Signed, sealed and delivered in presence of:
GEO. D. ROE.

NATIONAL SURETY COMPANY,
By P. C. KAUFFMAN,
Resident Vice-President.
By W. H. OPIE,
Resident Assistant Sec'y.

[National Surety Company, Seal.]

I hereby approve the foregoing bond and certify that the same is good and sufficient security, that the plaintiffs in error shall prosecute their writ to effect.

Dated at Olympia, this 19th day of May, 1909.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Endorsed: A. G. Prichard, Trustee, vs. Ruther Jacobs et al. Bond. Filed May 19, 1909, C. S. Reinhart, Clerk.

68 In the Supreme Court of the State of Washington.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
vs.
JERRY MEEKER et al., Defendants; RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of Ruther Jacobs, Appellants.

Assignment of Error and Prayer for Reversal.

Come now Ruther Jacobs, by E. D. Wilcox, his guardian and attorney, and Lilly Jacobs, by E. D. Wilcox, her attorney, and assign the following errors as having been committed by the Supreme Court of the State of Washington, in the decision of said case, and in making final judgment therein entered on the 11th day of October, 1907.

1.

The court erred in finding that "The Government was a voluntary donor of the lands, (involved in this suit) and as such it had power to place such restrictions upon the grant as it saw fit."

2.

The court erred in holding and deciding "The initiatory step toward alienation, prescribed by the Act of Congress, was the written consent of the allottees."

3.

The Court erred in holding and deciding that the written consent of all of the allottees was duly executed and delivered to the commission.

4.

The court erred in holding and deciding "If a mere power revocable at will or by death was what was intended, it would seem that the agreement for alienation would have been so defined. We think it manifest from the act itself that such was not intended."

69

5.

The court erred in holding "It plainly appears that the Government recognized the fact that it had reserved the power to act as trustee for the Indians, so far as alienation was concerned, notwithstanding the allotment in severalty."

6.

The court erred in deciding and holding "The statute required but one consent from an allottee, and it does not in terms require that when an allottee dies after consent is given and before sale, that his heirs must also consent."

7.

The court erred in holding and deciding that "The appointment of guardians for minor heirs of deceased allottees is manifestly for the purpose of effecting a proper distribution of the proceeds of a sale made in pursuance of a consent once duly given by the allottee himself.

8.

The court erred in holding and deciding that "The consent intended by the Act of Congress is in the nature of a contract to be carried out through the Department of the Interior for the benefit of the allottee and his heirs."

9.

The court erred in holding and deciding that "The consent was not revocable by the death of the allottee, but continues in force as an incident to the exercise of the power reserved by the patent itself to the government."

10.

The court erred in holding and deciding "As a matter of original construction, the Act of Congress is easily susceptible of the above interpretation (that given) and that it is a reasonable interpretation."

11.

The court erred in holding and deciding that the Department of the Interior in all its dealings with the Indians, or at all, has
70 construed the law in accordance with the decision of said court.

12.

The court erred in holding and deciding that where the carrying out of a statute and its provisions is intrusted to the executive department, the construction placed upon it by such department will be followed by the courts.

13.

The court erred in holding and deciding that the sale made by the Indian Commissioner was duly authorized, or authorized at all.

14.

The court erred in holding and deciding that the respondent's title should be quieted as against the appellants, or at all.

15.

The court erred in affirming the judgment of the lower court.

16.

The court erred in not holding that the appellants were the owners of the land in controversy and entitled to the possession thereof free from any claim of the respondent.

Prayer for Reversal.

Because of the foregoing errors, the said Ruther Jacobs, and Lilly Jacobs, and E. D. Wilcox, as Guardian, pray that the judgment and decision of the Supreme Court of the State of Washington, aforesaid, may be reversed, and judgment rendered in their favor.

E. D. WILCOX,
Attorney for Ruther and Lilly Jacobs and E. D. Wilson, as Guardian of Ruther Jacobs, Appellants and Plaintiffs in Error.

Endorsed: A. G. Prichard, Trustee, vs. Ruther Jacobs et al. Assignment of Error, etc. Filed May 19, 1909, C. S. Reinhart, Clerk.

71 In the Supreme Court of the State of Washington.

No. 6668.

A. G. PRICHARD, Trustee, Respondent,
vs.
JERRY MEEKER et al., Defendants; RUTHER JACOBS et al., Appellants.

Certificate.

I, Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington, do hereby certify that this suit was brought by the respondent, A. G. Prichard, Trustee, against the appellants, Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, their Guardian, and others, for the purpose of quieting his title to certain land situated in the Puyallup Indian Reservation, which had been patented to Charley Jacobs, the father of said Ruther and Lillie Jacobs, and the members of his family then in being, pursuant to treaty obligations, and which land had been bought by respondent at a sale conducted by C. A. Snowden, Puyallup Commissioner, under the written consent of the Indians named in the patent, and after the parents of said Ruther and Lillie Jacobs, who signed the consent to the sale of the land, had died; that the appellants above named at the hearing of said cause in this court contended that by the patent to the parents of said Lillie Ruther Jacobs, the United States parted with, and the grantees acquired, a fee simple title to the land described in the patent, and that the restrictions upon alienation therein contained were inserted for the reason, and only reason, that without such restrictions the Indian grantees would be able to convey a fee simple title, and might, through their ignorance
72 and inexperience, become impoverished; that the Act of Congress of March 3, 1893, was merely a partial removal of the restrictions upon alienation, and enabled the Indians to dispose of a part of their lands with the aid and assistance of an officer competent to look after their interests and such tranctions and see that a fair consideration was obtained; that the written consent of the Indian to a sale of his land did not transfer the title to the commissioner; that the said commissioner was by said consent constituted the agent and attorney of the Indian owner only, and as appears by the act, was to be compensated for his services by the Indian from the proceeds of the land, the government retaining ten per cent. of the proceeds; that the title transferred by a valid sale was the Indian's title, and that the sale was for the sole benefit of the Indian and derived its whole force and validity from the written consent and authority of the Indian; that the title to the land remained in the patentee until a valid sale had been actually made by the commissioner and the purchase price all paid; that should a sale not be made and the circumstances of the Indian change so that he might desire to retain the land, or if for any reason satisfactory to the Indian owner he repented of his consent, he could revoke the authority of his agent; that should the owner die before a sale had

been made, his title would immediately vest in his heirs, and any sale thereafter made must be upon the written consent of such heirs; that the number and situation of the heirs might be such that they would need the land and a sale without their consent might, and often would, defeat the policy of the Government toward the Indians and violate the letter and spirit of the treaty and Acts of Congress, and that the rules and regulations of the Interior Department to the contrary were repugnant to such treaty and acts of Congress, and illegal and void.

Appellants, therefore claimed that under a just interpretation of the treaty, patent and Acts of Congress referred to in the pleadings, and record in this cause, the title to the land in suit is still vested in Ruther and Lillie Jacobs, they never having consented to *to* a sale, and that judgment in this case could not go against them consistently with said treaty, patent and Acts of Congress.

73

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Dated June 2d, 1909.

Endorsed: A. G. Prichard, Trustee, vs. Jerry Meeker et al. Certificate. Filed Jun- 3, 1909, C. S. Reinhart, Clerk.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between A. G. Prichard, Trustee, and Jerry Meeker, et al., defendants and Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, Appellants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as Guardian of Ruther Jacobs, as by their complaint appears; We being willing that error, if any hath been, should be duly corrected, and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-
75 preme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-first day of May, in the year of our Lord one thousand nine hundred and nine.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, Western District of Washington,
By SAM'L D. BRIDGES,
Deputy Clerk.

75½ [Endorsed:] 6668. Filed Jun- 2, 1909. C. S. Reinhart, Clerk.

76 UNITED STATES OF AMERICA, *ss:*

To A. G. Prichard, Trustee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Sixty (60) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Washington, wherein Ruther Jacobs, Lillie Jacobs and E. D. Wilcox, as Guardian of Ruther Jacobs, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington, this second day of June, in the year of our Lord one thousand nine hundred and nine.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

76½ *U. S. Marshal's Return.*

Office of the United States Marshal for the Western District of Washington.

I hereby certify and return that I served the annexed writ of citation on A. G. Prichard Trustee, the defendant named therein, personally, at Tacoma, Washington, on this, the 3rd day of June, A. D. 1909, by delivering to and leaving with said defendant a copy of said writ.

C. B. HOPKINS,
United States Marshal,
By J. F. STATTER, *Deputy.*

Dated at Tacoma, Wash., on this 3rd day of June, A. D. 1909.

Marshal's fees, $2.06.

[Endorsed:] 6668. Filed Jun- 29, 1909. C. S. Reinhart, Clerk.

77 STATE OF WASHINGTON,
Supreme Court, ss:

I, C. S. Reinhart, Clerk of said court, do hereby certify that there was lodged with me as such clerk, in the case of Ruther Jacobs, et al., plaintiffs in error vs. A. G. Prichard, Trustee, defendant in error on the 19th day of May, 1909, the original bond of which a copy is herewith set forth and that on the second day of June, 1909, there was lodged with me as such clerk two copies of the writ of error, as herein set forth, one for the defendant, and one for my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Olympia, Washington, this 3d day of July, 1909.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

78 In the Supreme Court of the State of Washington.

No. 6668.

A. G. PRICHARD, Trustee, Defendant in Error,
vs.
JERRY MEEKER et al., Defendants; RUTH- JACOBS et al., Plaintiffs in Error.

I, C. S. Reinhart, clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause, and I further certify that in pursuance of the Writ of Error hereto-

fore filed in this cause I now herewith transmit the said transcript together with the original Writ of Error and the original Citation to the Supreme Court of the United States.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Olympia, this 3d day of July, 1909.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: File No. 21,757. Washington Supreme Court. Term No. 274. Ruther Jacobs, Lillie Jacobs, and E. D. Wilcox, as guardian of Ruther Jacobs, plaintiff in error, vs. A. G. Prichard, trustee. Filed July 16th, 1909. File No. 21,757.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of RUTHER JACOBS,

Plaintiffs in Error,

vs.

A. G. PRICHARD, Trustee.

Defendant in Error.

No. 93

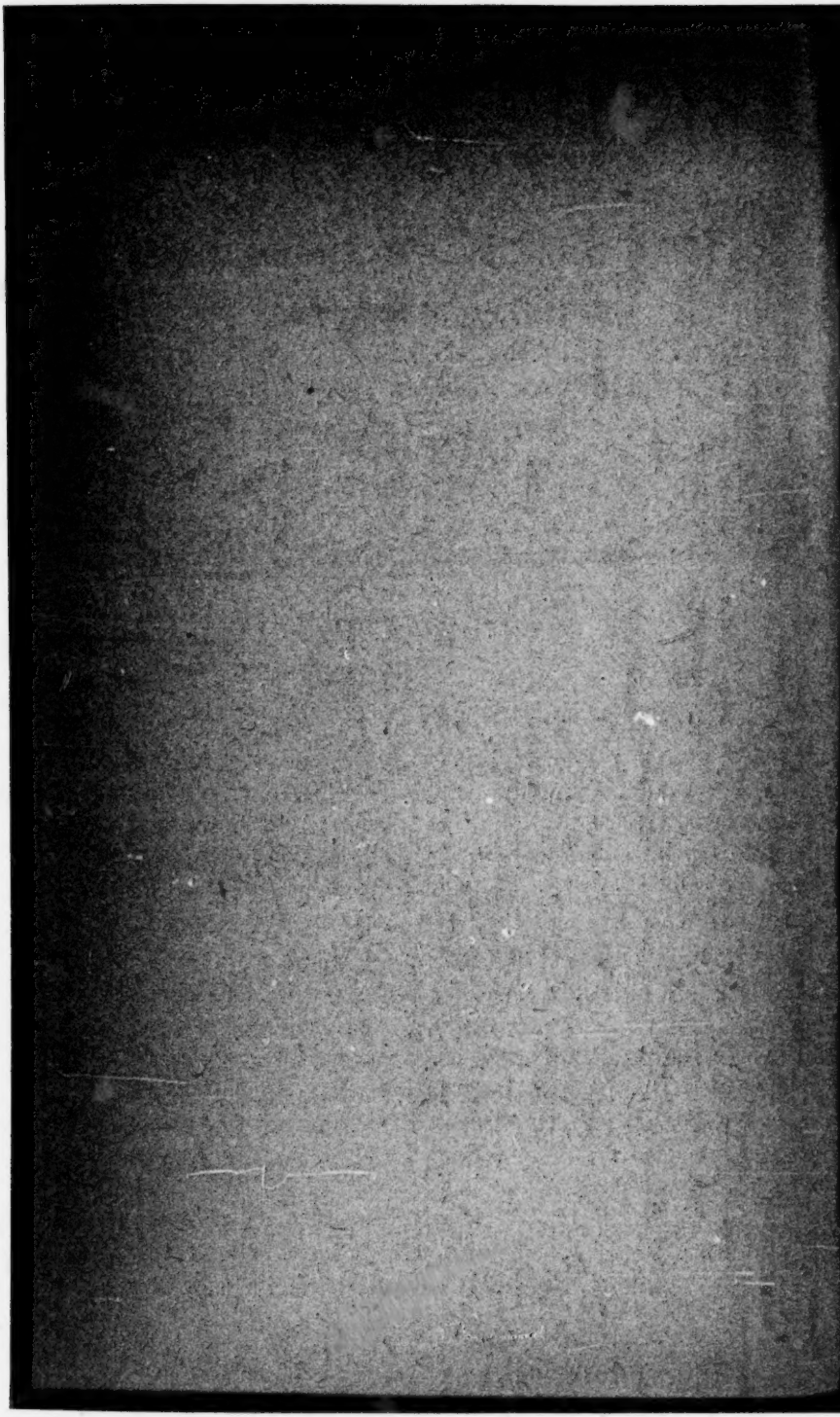
IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Plaintiffs in Error.

W. H. DOOLITTLE,
E. D. WILCOX,
JESSE THOMAS,
Attorneys for Plaintiffs in Error.

Tacoma, Washington.

Allen & Lamborn Printing Co., Tacoma, Wash.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of RUTHER JACOBS,
Plaintiffs in Error,
vs.
A. G. PRICHARD, Trustee.
Defendant in Error.

No. 93

STATEMENT OF THE CASE.

This is a contest over the ownership and title to the east half and the east half of the east half of the west half of the northwest quarter of the northwest quarter of Section thirty-five (35), township twenty-one (21), North of Range three (3) east of Willamette Meridian, Pierce County, Washington, formerly in King County, Washington.

This land lies in the Puyallup Indian Reservation and was patented by the United States Government on the 30th day of January, 1886, to Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank and Oscar, all Puyallup Indians, said patent being subject to the stipulations and conditions contained in Article Six of the Treaty of the United States with the Omaha Indians. Said patent and said Article Six of the Treaty with the Omahas, are set forth fully in the

agreed statement of facts. (Record, p. 11, par. 31)

Defendant in error claims title by deed from C. A. Snowden, Trustee and Commissioner of Puyallup Lands, appointed by the United States Government under Act of Congress to sell these lands under the conditions as set forth in said Act, said Act being of date March 3, 1893. (27 Stats., 612) The sale and deed from Snowden to plaintiff therein was of date the 27th day of February, 1901. (Record, p. 11, par. 4).

The plaintiffs in error claim title to an undivided half of the premises in question as heirs of Charley and Julia Jacobs, deceased, and further claim the Snowden deed void as to them or as to the interest they would take as such heirs for the reason that the Snowden sale and deed were after the death of Charley and Julia Jacobs.

The vital question is whether the death of Charley Jacobs and Julia Jacobs, after their authorization to Mr. Snowden, to sell under the Act of March 3, 1893, would, in itself, revoke his authority to sell and avoid any sale or deed made after their death.

This action was brought by A. G. Prichard, trustee, against Jerry Meeker and others, to quiet title to the land hereinafter described. All the defendants, except plaintiffs in error, defaulted and made no appearance at the trial, or otherwise, in the case.

Defendant in error claims that he is the owner of and in possession of the land involved in this controversy, and that each of the plaintiffs in error claim and assert an interest therein adverse to him, and that such claims are without right. (Record, p.

2). Plaintiffs in error answered, denying the ownership and possession of the land by defendant in error and for further answer and affirmative defense allege: That on the 30th day of January, 1886, the premises involved were patented to their father, Charlie Jacobs, by patent as set forth in their answer (Record, p. 5); that Charlie Jacobs died in Pierce county, Washington, on the 26th day of January, 1900, intestate, and that his wife, Julia Jacobs, died on the 4th day of October, 1900, intestate; that upon the death of said Charlie Jacobs and Julia Jacobs an undivided one-half of the land in controversy herein descended to and vested in plaintiffs in error, Ruther Jacobs and Lillie Jacobs, as heirs of said deceased parents, and that plaintiffs in error had not, nor had either of them, conveyed or sold said land or any part thereof. (Record, p. 7). Defendant in error replied to the special defense, denying any knowledge or information as to most of said answer, and denied that upon the death of said Charlie Jacobs and Julia Jacobs the title to said land vested in the plaintiffs in error and for affirmative reply alleges: That in the latter part of the year of 1898 Charlie Jacobs, and the other persons named in the patent, executed and acknowledged an instrument in writing and appointed Clinton A. Snowden, of Tacoma, Washington, as commissioner of Puyallup lands, trustee to sell the land in controversy herein, and that after approval of said instrument by the Secretary of the Interior, and on the 27th day of February, 1901 (after the death of both Charlie and Julia Jacobs, the parents of plaintiffs in error), the said Snowden sold said premises to defendant in error herein and executed and delivered to him a deed for said premises, and that a portion of the purchase

price paid by him for said land and premises had been paid to the guardian of the two Jacobs children, plaintiffs in error herein. (Record, pp. 8-9).

Prior to the trial of this action plaintiffs in error, Ruther Jacobs, by his guardian, E. D. Wilcox, and Lillie Jacobs in her own behalf, tendered to respondent herein the money that each had received as the proceeds from the sale to defendant in error, and demanded a quit claim deed from him to their respective interests in said land, which was refused by respondent. (Record, p. 28).

An agreed statement of facts was submitted to the trial court, and no oral testimony was taken at the trial. The statement of facts on appeal certified by the trial judge, September 20th, 1906, is the same as the agreed statement used upon the trial of this action. (Record, pp. 17 to 31).

The question involved in this action is the effect of the instrument executed by Charlie Jacobs, Julia Jacobs and Frank Jacobs on the 7th day of March, 1898, authorizing Clinton A. Snowden to sell the land involved herein. (Record, bottom p. 23).

Plaintiffs in error contend that it is of no greater force or effect than an ordinary power of attorney—in fact, that it is nothing more than a power of attorney—and the authority therein conferred upon Mr. Snowden died with the makers thereof, Charlie Jacobs and Julia Jacobs, and that defendant in error acquired nothing, so far as plaintiffs in error are concerned, by the attempted sale by Commissioner Snowden on February 27th, 1901, and the same was and is void.

The trial court decided in favor of the defendant in error. The plaintiffs in error appealed to the

Supreme Court of the State of Washington, and that Court affirmed the trial court in an opinion filed July 9, 1907, in which it held that the government was a voluntary donor of these lands and as such had the power to place such restrictions upon the grant as it saw fit; that the ultimate power to confer the right of alienation was reserved in the Government by the grant and in pursuance with that reserved power, congress passed the Act of March 3, 1893, conferring full power of alienation and prescribing the method of its exercise; that the initiatory step toward alienation was the written consent of the allottees; that the written consent of the allottees named in the patent was duly executed and delivered to Commissioner Snowden; that Charley and Julia Jacobs died after consent was given and before a sale was made; that the words "Power of Attorney" are not used in the act of congress prescribing the method of alienation. The office of a power of attorney is well understood. If a mere power revocable at will or by death was what was intended it would seem that the agreement for alienation would have so defined; that it plainly appears that the Government recognized the fact that it had reserved the power to act as trustee for the Indians so far as alienation was concerned, notwithstanding the allotment in severalty; that the Act does not in terms require that when an allottee dies after consent is given and before sale that his heirs must also consent; that the Act requires the commissioner to procure the appointment of guardians for minor heirs of deceased allottees, but that it is manifestly for the purpose of effecting a proper distribution of the proceeds of sale made in pursuance of a consent once duly given by the allottee himself; that the consent is in the nature of a contract to be carried

out through the Department of the Interior for the benefit of the allottee and his heirs and that the consent once given is not revoked by the death of the allottee. As a matter of original construction the Act of Congress is susceptible of this construction and it seems a reasonable interpretation; that the Department of the Interior in all its dealings with the Indians has so construed the law, and where a statute entrusts the carrying out of its provisions to the Executive Department its interpretation by that department will be followed by the courts unless there are cogent reasons to the contrary. (Record, pp. 37-38).

Judgment was entered in accordance with the decision and plaintiffs in error have brought the case to this Court and assign the following errors:

ASSIGNMENT OF ERRORS.

1.

The court erred in finding that "The Government was a voluntary donor of the lands, (involved in this suit) and as such it had power to place such restrictions upon the grant as it saw fit."

2.

The court erred in holding and deciding "The initiatory step toward alienation, prescribed by the Act of Congress, was the written consent of the allottees."

3.

The court erred in holding and deciding that the written consent of all of the allottees was duly executed and delivered to the commission.

4.

The court erred in holding and deciding "If a

mere power revocable at will or by death was what was intended, it would seem that the agreement for alienation would have been so defined. We think it manifest from the Act itself that such was not intended."

5.

The court erred in holding "It plainly appears that the Government recognized the fact that it had reserved the power to act as trustee for the Indians, so far as alienation was concerned, notwithstanding the allotment in severalty."

6.

The court erred in deciding and holding "The statute required but one consent from an allottee, and it does not in terms require that when an allottee dies after consent is given and before sale, that his heirs must also consent."

7.

The court erred in holding and deciding that "The appointment of guardians for minor heirs of deceased allottees is manifestly for the purpose of effecting a proper distribution of the proceeds of a sale made in pursuance of a consent once duly given by the allottee himself."

8.

The court erred in holding and deciding that "The consent intended by the Act of Congress is in the nature of a contract to be carried out through the Department of the Interior for the benefit of the allottee and his heirs."

9.

The court erred in holding and deciding that "The consent was not revocable by the death of the allottee, but continues in force as an incident to the

exercise of the power reserved by the patent itself to the government."

10.

The court erred in holding and deciding "As a matter of original construction, the Act of Congress is easily susceptible of the above interpretation (that given) and that it is a reasonable interpretation."

11.

The court erred in holding and deciding that the Department of the Interior in all its dealings with the Indians, or at all, has construed the law in accordance with the decision of said court.

12.

The court erred in holding and deciding that where the carrying out of a statute and its provisions is entrusted to the Executive Department, the construction placed upon it by such department will be followed by the courts.

13.

The court erred in holding and deciding that the sale made by the Indian Commissioner was duly authorized, or authorized at all.

14.

The court erred in holding and deciding that the respondent's title should be quieted as against the appellants', or at all.

15.

The court erred in affirming the judgment of the lower court.

16.

The court erred in not holding that the appellants were the owners of the land in controversy and entitled to the possession thereof free from any claims of the respondent.

The controversy herein involves the construction of the Act of Congress of March 3, 1893, and the power given to the Puyallup Commissioner by the so-called consent executed by the Indian owner as the basis of the acts of the commissioner. The Act of 1893 is as follows:

ACT OF MARCH 3, 1893.

"That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian allottees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington, and if the Secretary of the Interior shall approve the selections and appraisements made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine to be secured by vendor's lien on the property sold.

"It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; and the whole amount received for allotted lands shall be placed in the Treasury to the credit of the Indian entitled thereto and the same shall be paid to him in

such sums and at such times as the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, shall direct: PROVIDED, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, and sold in separate lots in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the expenses of said commission, including salaries, shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: AND PROVIDED FURTHER, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act and *no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof,* and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; *and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement,* which shall also constitute said commissioners, or a majority of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions. The proceeds arising from the sale of the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisement and sale of said lands, and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to the credit of all said Indians, and the said sums shall draw interest at the rate of four percentum per annum, and the

income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: PROVIDED, That an amount not exceeding one-tenth of the principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior: PROVIDED FURTHER, That the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said Commission to superintend the execution of any of the requirements of said Commission herein provided for.

"And the sum of twenty thousand dollars or so much hereof as may be necessary, is hereby appropriated for the purposes of defraying the expenses of said commission, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be immediately available." (27 Stats., 612).

This Act is now before this Court for original construction.

ARGUMENT AND AUTHORITIES.

It is immaterial in this case whether or not the Department has construed the so-called consent to be something more than a naked power to sell, as this is a question of law, and not of fact, and while the findings of the Department of the Interior, especially the Land Department and its various branches, are held to be binding on questions of fact, no such rule can be found as to questions of law on rulings made by officers of the departments of the Government.

In the case of *Moore vs. Robbins,* 96 U. S., 530, Mr. Justice Miller, in delivering the opinion of the court, says:

"That the decision of the officers of the Land Department, made within the scope of their authority on questions of this kind, is, in general, conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man land which on the undisputed facts belonged to another, to give appropriate relief."

Moore vs. Robbins, 96 U. S., 530, 24 Law Ed., 848-851;

Marquez vs. Fisbie, 101 U. S., 473, 25 Law Ed., 800-801;

Shepley vs. Cowen, 91 U. S., 330, 23 Law Ed., 424;

Johnson vs. Towsley, 13 Wall., 72, 20 Law Ed., 485;

Quimby vs. Conlan, 104 U. S., 420, 26 Law Ed., 800-802.

The regulation of a department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain.

Robertson vs. Downing et al., 127 U. S., 402, 8 Sup. Ct. Repts., 1328-30.

Defendant in error bases his whole contention upon the fact that the Department of the Interior has construed this matter in his favor. Plaintiffs in error contend that, no matter what the Department has done, they were not parties to it; knew nothing of it; had no chance to be heard or to appeal; the Department was in error; and plaintiffs in

error are in no way bound by what has been done. The construction given by the Department has not become a rule of property universally applied to these Puyallup lands; in fact, this Court has repeatedly decided these questions in direct opposition to the holding of the Department, and we believe we have shown there is no question that upon a matter of law the construction of the Department is not at all binding, and this Court will not be bound thereby. The act of March 3d, 1893, is plain and complete in itself, and the only power given to the Secretary of the Interior is to approve the acts of the Commission and to make all necessary regulations to carry out the provisions of the act. Under this he can no doubt make regulations in regard to the time of payment, place where the same shall be paid, when and where the land shall be sold, and many other regulations affecting the actual manual work of selling the land; but he can not say that Charley Jacobs' land shall be sold, whether or not he signs a so-called consent, and he can not say, as a matter of law, that when such consent is signed it is irrevocable, or that it creates a trust in the Government which can not be revoked by the Indian, and is not revoked by death. In order for the defendant in error to prevail in this case such must be the holding of this Court.

Even if there was a trust created in the Commission to sell this land, it is not a trust coupled with an interest, and it would not survive.

We ask the Court not to lose sight of the fact that the patent in this case was not issued under the act of 1887 (24 Stats., 388), but under the treaty, and the conditions imposed and the right to the land conveyed by the two patents are very different. In the patents issued under the act of 1887 the Govern-

ment agrees to hold the title for the Indian for a period of 25 years, and then convey to him the title to the land, but in Puyallup patents the Government conveyed the title to the Indian by its patent, January 30th, 1886, and there is no condition or promise to convey any further title. In fact, there could not be, as the Government then parted with its whole title. Neither was there a condition in the Puyallup patent that the Indian should not convey his land without the consent of the President.

This land was patented to Charley Jacobs pursuant to the treaty of the United States with the Nisqually, Puyallup and other Indians concluded on Dec. 26, 1854, (10 Stats., p. 1132) by which in return for the relinquishment of the Indians' rights to a vast tract of land, it was provided in the sixth article that the President, "at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected, in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on them as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable," and the regulations provided in said treaty with the Omahas, which were applicable to the patent to Charley Jacobs, were: that the said tracts "shall not be alienated or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the state shall remove the restrictions," and "no state legislature shall re-

move the restrictions without the consent of congress." The United States conveyed the land involved to Charley Jacobs and his heirs in the following words: "The United States, in consideration of the premises * * * has given and granted, and by these presents, does give and grant unto the said Jake Tai-ugh, or Charley Jacobs, as the head of the family aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in said sixth article of the treaty with the Omahas," the restrictions against alienation, levy, sale and forfeiture, aforesaid, and plaintiffs in error contend that Charley Jacobs took an absolute fee simple title, which upon his death descended to his heirs and at his death the plaintiffs in error herein took his title subject only to said restrictions against alienation, etc. (See Patent, Record, p. 5).

The Indians gave up their claims to other land and took this in payment, and after the issuance of the patent to an individual, it was his absolutely and for value given.

The restrictions were finally removed ~~Nov.~~ MAR. 3, 1903.

In *Lykins vs. McGrath*, 184 U. S., 169, where the restriction was in compliance with a treaty, as in this case, this court says:

"Title passed to him by the patent and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title," and in speaking of the rights of two heirs, the plaintiffs in error in that case, this court says: *"They are the heirs of the Indian grantor and as such may rightfully claim to inherit and be secure in the possession of all that property to which he had*

at his death the full equitable title, but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated price and that price was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity to those of the one who had thus bought and paid full value," and this Court denied the right of the heirs to the land, where a deed had been made and delivered during his life time, the purchase price paid and after his death the Secretary approved the deed.

In the case at bar there had been no sale prior to Charley Jacobs' death, consequently no consideration paid or deed given and Charley Jacobs held both the legal and equitable title at the time of his death, which descended to the plaintiffs in error herein.

The Act of March 2, 1893, (10 Stats., p. 1132) provides, "no part of the allotted land shall be offered for sale until the *Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof and appointing said Commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof.*"

* * *

The state court seems to have confused the words of the Act and held that the consent of the ALLOTTEES, instead of the OWNERS—the Indians entitled to it—was all that was required to initiate a sale. Plaintiffs in error contend that congress by the Act required the written consent of the Indian *owner—the person entitled to the land—at the time of sale,* and never having the consent of plaintiffs in error, the sale is void as to them.

The Act requires that the Commissioners shall "have guardians duly appointed for the minor heirs of any deceased allottees." We contend that this appointment must be for all purposes. The Act says have guardians appointed for the minors for all purposes. If you restrict his acts in one way you can in another, so he would have no power at all.

We contend that the consent was a naked power to sell, and, where, as in the case at bar, no sale was made during the period of ownership by the giver of the consent, the power terminated. The title to the land had passed from the United States by its patent and the commissioners were only agents of the Indian to sell the land. No sale having been made there was nothing to continue in force after death, as the land, after the death of the allottee, was the property of another. Under the Act of Congress of 1887, 24 Stats., 388, the laws of the State of Washington govern the descent of this land. That law is found in session laws of Washington, for the year 1895, at page 197, and section 1 thereof reads:

"Where a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent * * *."

Plaintiffs in error do not question the good faith of any of the officers of the Government in this mat-

ter, or of the respondent in buying, but they do contend that the construction placed upon this consent by the officers of the Department was and is erroneous.

Congress, in the Act of March 3d, 1893, recognized that the United States had no interest in or right to sell these lands, even the agency tract, without the consent of the Indian owners, when it required such consent to be obtained before making a sale. No other construction can possibly be placed upon this act, as, if Congress had considered that the United States had the right to sell the land, or even the right to deal with the Indians and buy their right, it would have so provided; but Congress said "*no part of said land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof.*" Will this Court say that Congress by that act fixed any particular date at which it should be determined who were the owners of the land, and, no matter what happened thereafter, the determination on that date should fix the ownership of the land for all time? Must not the act be construed that the Commissioner must determine who the owner is at the time of sale, and does it not follow in case of the death of an owner and the descent of his land to his heirs that there must be a new determination by the Commission and new consent obtained?

The Act of 1893 and of 1887 in their application to the Puyallup Indians and their lands, was before the Federal Court in the case of *United States vs. Kopp,* 110 Federal Rep., 160, and in his decision, Hanford, judge, says:

"To maintain this prosecution, the district attorney contends that, inasmuch as the sixth section

of the act confers upon the Puyallup Indians the rights of citizenship, the fifth section must also affect them, and control the patents issued to them, and constitutes the Government a trustee to hold the lands patented to them, for a period of 25 years. This argument in untenable. The words of the fifth section restrict its application to patents to be issued in the future, and require the trust to be declared in the patents; but the sixth section plainly expresses the intention of congress to confer the rights of citizenship upon the Indian allottees contemplated by that act, and also upon other Indians born in the United States to whom allotments shall have been made under any law or treaty, and also upon other Indians born in the United States who have voluntarily taken up residences separate and apart from any tribe of Indians and adopted the habits of civilized life. Moreover, the patents granting lands to the Puyallup Indians were issued in 1886, and the Government, having divested itself of the title, could not take it back in 1887. The Act of 1893 also shows clearly that Congress did not then consider the Government as being a trustee, holding the lands which had been patented to the Puyallup Indians. That act specifically requires the patentees to execute agreements in writing constituting the commissioners, or a majority of them, trustees to sell the lands and make deeds to the purchasers. This provision is repugnant to the theory of the Government being a trustee to hold these lands for a period of 25 years, but it is entirely consistent with the elementary principle that a valid power to sell and convey the title to property should emenate from the holder of the title, and is in effect an implied legislative determination that the title to the tracts which had been assigned to individual Indians was conveyed to them by the patents. The Government continues to have and to exercise the right to restrict alienation of these lands, but it does not hold the title in trust. The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the

United States, having all the rights, privileges and immunities of other citizens, and they are not under the guardianship of the United States Government, nor under the charge of any Indian superintendent or agent."

United States vs. Kopp, 110 Fed., 160.

Goudy vs. Meath, 38 Wn., 129 affirmed in *Goudy vs. Meath,* 27 Sup. Ct. Rep., 48.

Wa-la-note-tke-tying vs. Carter, 53 Pac. (Idaho), 106.

Re Huff, 197 U. S., 488; 49 L. Ed., 848, 24 Sup. Ct. Rep., 506.

When the Government patented the land the title in fee simple passed to the Indian, subject only to the restriction against alienation, which the Government had the right to make. The Indian being a citizen of the State of Washington, all his acts relative to said land must be governed by the same laws as if a white man owned the land, and whatever title respondent has must come from the Indian. The authority given Clinton A. Snowden, as Commissioner of Puyallup lands, appears in the Act and plaintiffs in error contend that there being no terms of grant or conveyance in the consent, whatever power was given by it ceased and terminated upon the death of Charlie and Julia Jacobs, prior to the attempted sale to defendant in error. Upon their death the title to the land immediately vested in their heirs, and plaintiffs in error took an undivided one-half of the land in controversy.

I think we have shown conclusively that the title in fee passed from the United States by its patent and after the death of the parents in order to divest these heirs of their title to the land one of two things must appear: First, that the plaintiffs

in error having power to do so, have conveyed the land; and it is nowhere claimed that they have; or, second, that the paper set forth at page 23 of the record, gave some right or authority to Snowden that survived the giver. We submit to the Court that this instrument of March 7, 1898, is of no greater power or authority than an ordinary power of attorney and is subject to the same rules and restrictions.

The leading case upon this subject is *Hunt vs. Rousmanier's Admstrs.,* 8 Wheaton, 174, 5 L. Ed., 589.

In that case, Mr. Chief Justice Marshall delivered the opinion, and in distinguishing between the powers delegated by instruments authorizing another to act in the place of the giver of the power, says:

"This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is that a letter of attorney may, at any time, be revoked by the party who makes it; and *is revoked by his death.* But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by

any act of his own, have revoked this letter of attorney. But does it retain its efficiency after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, became extinct by his death. * * * This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death."

Hunt vs. Rousmanier's Admstrs., 8 Wheat., 174, 5 L. Coop. Ed., 589.

"No principle is better settled than that the power of an agent ceases on the death of his principal. *If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void.*"

Galt et. al. vs. Galloway et. al., 4 Peters, (U. S.) 332, 7 L. Coop. Ed., 876-880.

McCasky vs. Barr, 50 Fed., 712.

Frink vs. Roe, 70 Cal., 296, 11 Pac., 820-4.

Staples vs. Broadbury, 8 Me., 181. 23 Am. Dec., 494.

Story on Agency, Sec., 489.

We contend that this Court now has before it the condition contended for by the counsel for the plaintiffs in error in *Lykins vs. McGrath*, heretofore cited, i. e., "a mere authority to convey which loses its vitality at the death of the grantor of the power."

It is conceded that the plaintiffs in error and their guardian had no knowledge that this sale was made after the death of Charley and Julia Jacobs, until the bringing of this suit. There was no public record of the sale and the guardian's attention had never been called to it and when he knew of it he did everything he could to disaffirm it. (Record, pp. 28 and 31).

The plaintiffs in error had the right to rely on the facts that this land descended to them at the time of the death of their parents and that under the law it could not be sold without their consent; it was not taxable and was not subject to levy, sale or forfeiture and the Government and its officers would not do anything to deprive them of their land. This court likened the execution and delivery of the deed in the Lykins case to an escrow, the deed to be delivered upon the performance of some condition, instead of a power of attorney, but in the case at bar none of the features of an escrow are present, but simply a naked power to sell, in the commissioner, who by the act creating the commission, is made the agent of the Indian and must be paid from the proceeds of the sale, the Government disaffirming any interest in the land, but in pursuance of its long standing policy, standing by and looking to the protection of the Indian from imposition or fraud on the part of those dealing with him.

Neither of the plaintiffs in error was a party to the authority given by Charley and Julia Jacobs to C. A. Snowden to sell the land and neither had any knowledge of it, or the sale of the land after the death of Charlie and Julia, until after the commencement of this action, nor had they any notice, or knowledge of the construction placed upon said written instrument by the officers of the Interior Department and the action directed by the said officers and they never acquiesced in the same in any manner whatever. (Record, p. 31).

Plaintiffs in error contend that under all the law said so-called consent to sale of the land in controversy is nothing more than a *naked authority to sell and convey the land* in the name of the principal and

could have been revoked at any time by the givers and was revoked by death.

The Supreme Court of Washington recently passed upon the question of the revocation of the authority of an agent (and the United States was nothing more than an agent of the Indian) and a power coupled with an interest in the case of *Norton et. al. vs. Sjolseth.* In that case the owners of land gave written authority to an agent for seven days to sell the land. Prior to the expiration of that time they notified the agent that they would not sell the land and revoked his authority, and the court held that the power to sell did not reside in the agent after it had been revoked, and the purchaser of the land after the revocation of the agent's authority had no rights; that the authority to the agent to sell did not create a power coupled with an interest.

Norton vs. Sjolseth, 43 Wash., 327.

Plaintiffs in error contend that the authority given by their parents was a naked power to sell, and, it having been revoked by the death of Charley and Julia Jacobs, there was no authority in the Commission to sell, and respondent took nothing by the attempted sale.

Even if there had been a trust imposed upon the Commissioner by the consent, it was revoked by the death of Charley Jacobs prior to its execution.

In the case of *Harmon vs. Smith,* 38 Fed., 482, George K. Swift by his will gave his executor and trustee all of his estate, with power to sell, for the use and benefit of the testator's sister, J. Rebecca Harmon. Mrs. Harmon died, leaving surviving her her husband and three minor children. Ten years after the death of Mrs. Harmon the executor of

the Swift will sold certain land to the defendant Smith. The suit was brought to set aside the deed. Nelson, Judge, in deciding the case, says: "Kinsman (the executor) only took the legal title, subject to the trust, and on the death of Mrs. Harmon the estate, real and personal, vested in her representatives. The trust ceased to be active and was then determined, and the estate belonged to the complainants, for the doctrine is well settled that the trustee only takes that quantity of interest which the purpose of the trust required and the will permits, and its duration continues to that extent only. * * * * *Kinsman was not the trustee of the representative of Mrs. Harmon, and when he undertook to sell, after her death, the sale was utterly void.* * * * *Smith knew the sale was made by Kinsman acting as executor and trustee in the exercise of authority claimed under the will of Smith. It is so recited in the deed. He was put upon inquiry to ascertain whether the power existed to sell, and he must ascertain at his peril whether Kinsman had the estate which he professed to convey.*"

Harmon vs. Smith, 38 Fed., 482.

4 Kent. Comm., 310 and note.

Gartland vs. Nunn, 11 Ark., 720.

Bradstreet vs. Kinsella, 76 Mo., 63.

28 Am. & Eng. Enc. of Law, (2d Ed.) 1000.

We believe it is established beyond question that the title passed to the Indians by the patent and the so-called consent did not convey the title from the Indian, there being no words of conveyance, there was no title passed, and at his death the land descended to his heirs, and they not having conveyed their interest, are still owners of same.

Charley Jacobs was a citizen of the United States with the title of this land vested in him and the title cannot be divested, nor could he divest himself of the title except in the ways provided by the statutes. Upon his death the title vested in his heirs, and neither the Secretary of the Interior, nor any other executive officer of the United States, has any power to divest them of that right by any rule or custom of the department or by instructions given to any cimmissioner to sell the land.

The Secretary of the Interior has no judicial power to adjudge a forfeiture, to decide questions of inheritance or to divest the owner of his title without his knowledge or consent.

Richardwille vs. Thorp, 28 Fed., 52.

The above decision of Judge Brewer was quoted and approved by this court in

Jones vs. Meehan, 175 U. S., 1.

To allow the construction contended for by respondent, means that the property of plaintiffs in error will be taken from them without due process of law, and contrary to section one of the 14th amendment to the Constitution of the United States.

Plaintiffs in error have been vested with the title by descent from their ancestors and cannot be divested of the title without being made personally parties to the proceeding.

Defendant in error contended before the lower court that the construction placed upon the consent by the Secretary of the Interior has been uniformly acquiesced in to this date and has become a rule of property.

There is not one word in the record in this case

showing that there has been a long continued construction of this consent and it has become a rule of property, or that there is any title involved, except that in this case. The fact is that this is the first time the matter has ever been before any court.

Let us look at this for a moment. The restrictions were removed March 3, 1903, after which time the Indian was free to sell his land. This was less than two years before this suit was brought. The undisputed facts are that both plaintiffs in error were minors at the time of the commencement of this action, and they could not in any way be held guilty of laches. They contend that no such time has elapsed, in any event, as to establish such a rule as contended by defendant in error. The only evidence upon which the finding could be based is the statement of the Secretary of the Interior, in his letter, as to what has been the practice in his office, but there was no evidence before the court showing that any property rights have vested under that rule or any title is dependent upon the application of it other than the case at bar.

In the case at bar the record (page 28) shows that defendant in error made no inquiry or investigation before his purchase, but he relied wholly upon the regularity of the proceedings. Probably, as a matter of fact, he bid for the property without giving the matter even a passing thought, assuming, like hundreds of others, that any title which the Government offers for sale is good, whether it is Government land or not.

The Act of March 3d, 1893, is in derogation of the usual and ordinary rights of citizens, and it will not be enlarged, but will rather be limited and strictly construed by the court.

The decision of the lower court should be reversed and the title of plaintiffs in error to the land in controversy should be quieted against the defendant in error and all parties claiming by, through or under him.

Respectfully submitted,

W. H. DOOLITTLE,
E. D. WILCOX,
JESSE THOMAS,
Attorneys for Plaintiffs in Error.

Tacoma, Wash.

21,757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910

[redacted]

RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of RUTHER JACOBS,
Plaintiffs in Error,
vs.
A. G. PRICHARD, Trustee.

No. 93.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Defendant in Error.

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ALLEN & LAMBORN PRINTING CO. TACOMA, WASH.

21,757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910

No. 274

RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of RUTHER JACOBS,

Plaintiffs in Error,

vs.

A. G. PRICHARD, Trustee.

STIPULATION TO SUBMIT CAUSE WITHOUT ORAL ARGUMENT.

IT IS HEREBY STIPULATED between the plaintiffs in error, and A. G. PRICHARD, Trustee, defendant in error, that this cause be submitted to the Supreme Court of the United States for determination and decision upon the record and briefs in the cause, and without oral argument or appearance in person, or by attorneys at the time the case is reached for oral argument in said court.

W. H. DOOLITTLE,
E. D. WILCOX,
Attorneys for Plaintiffs in Error.

STANTON WARBURTON,
OVERTON G. ELLIS,
JOHN D. FLETCHER,
Attorneys for Defendant in Error.

21,757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910

No. 274

RUTHER JACOBS, LILLIE JACOBS, and E. D. WILCOX, as Guardian of RUTHER JACOBS,

Plaintiffs in Error,

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A. G. PRICHARD, Trustee.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Defendant in Error.

STATEMENT.

This is a suit to quiet title to land in which the defendant in error was the plaintiff. The cause was tried upon an agreed statement of facts without a jury, which statement of facts is set out in full in the Transcript of Record, original pages 34 to 51 inclusive, printed pages 17 to 32 inclusive. While the agreed Statement of Facts is not very long and contains all the facts, it may be of some assistance to the court to present a chronological statement in this brief.

On January 30, 1886, the United States Government patented the premises in controversy to Charley Jacobs as the head of a family consisting of himself, Julia, Annie, Frank and Oscar, all Indians and members of the Puyallup Tribe. (Trans. of Record, original pp. 34 and 35, printed pp. 18 and 19.) This patent, like other Puyallup Indian Land patents, was subject to the provisions of the Sixth Article of the Treaty with the Omaha Indians, which article provides, among other things, that "The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in Article First, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home," etc. * * * "And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. * * * And if any such person or family shall at any time neglect or refuse to occupy and fill a portion of the land assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family

of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations as may hereafter be prescribed by the Congress or President of the United States. No State Legislature shall remove the restrictions herein provided for, without the consent of Congress." (Trans. of Record, original pp. 36 and 37, printed pp. 19 and 20).

On March 3, 1893, Congress passed an act (27 Stats., 612) empowering the President of the United States to appoint a Commission of three persons whose duties were defined to be, among other things, to select and appraise such portions of the allotted lands as are not required for homes for the Indian allottees; to sell the same for the benefit of the allottees, after due notice, at public auction; to superintend the sale of the said lands, ascertain who are the true owners of the allotted lands, make deeds subject to the approval of the Secretary of the Interior, the money to be placed in the Treasury to the credit of the Indian entitled thereto, to be paid to him in such sums and at such times as the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, shall direct, the Indian allottees to sign written agreements consenting to the sale, and appointing said Commissioners trustees to sell said lands and make deeds, the deeds to be approved by the Secretary of the Interior, who is directed to make the necessary regulations to carry out the purposes of the

act. (Trans. of Record, original p. 38, printed p. 21).

On November 6, 1893, the Department of the Interior instructed the Commissioners to appraise the allotted lands not required for homes for the Indians, to obtain written agreements from the allottees consenting to the sale, and appointing the Commissioners trustees to sell and make deeds; to determine the legal heirs of any deceased allottee, according to the laws of the State of Washington; to report all their acts to the Interior Department for approval, and to act according to further instructions to be thereafter given. (Trans. of Record, original p. 39, printed pp. 21 and 22).

In 1895 the Commissioners were further instructed by the Secretary of the Interior, that they were not required to go into the state courts to determine the heirs, but were themselves to apply the rules prescribed in their instructions, and when the heir or true owner was ascertained, to obtain his consent to the sale of the allotment in manner provided by the act; that the President had the right to prescribe rules for the descent of these lands; that the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties; that the Secretary of the Interior is charged by law with the management and control of Indian affairs; that the allottees were still the wards of the Nation and the Secretary of the Interior was charged by law with the duties of guardianship. (Trans. of Record, original pp. 39 and 40, printed p. 22).

On June 7, 1897, Congress passed an act (30 Stats., 62) reducing the number of commissioners

to one. This act was practically in all respects similar to the act of March 3, 1893, except that it provided for one commissioner instead of three. (Trans. of Record, original p. 40, printed p. 22). Under date of July 2, 1897, the Interior Department notified Clinton A. Snowden that he had been appointed, pursuant to said act, such sole commissioner, and instructed him as follows:

"It will be your duty to sell or offer for sale under previous instructions to the commission, the unsold allotted lands whose appraisements have been approved and sale authorized, and to obtain the written consents of sale, if possible to do so, of other Indian allottees and the members of their families * * * When such schedules, written consent and appraisals shall have been received they will be laid before the Secretary of the Interior for his consideration and approval. Upon approval of the appraisements and authorization of the sale of the lands you will be instructed to sell the same. * * * That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family. It is necessary to obtain the written consert of all the members of the family named in the patent. *That it is necessary to have legal guardians appointed for minors who are themselves allottees, but not minor heirs of deceased allottees.* It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees." (Trans. of Record, original p. 40, printed pp. 22 and 23).

The allottees named in the patent were related as follows:

Charley Jacobs, the head of the family; Julia,

his wife; Annie, his sister; Frank, his son by a former marriage, and Oscar, his son by his wife Julia.

Annie, named in the patent, died in November, 1888, never having been married, leaving no father, mother, children, brothers or sisters except Charley Jacobs, her brother, who was her sole heir.

The plaintiffs in error, Lillie and Ruther Jacobs, were born after the issuance of the patent—Lillie in the year 1888, and Ruther in 1890. They were the children of allottees Charley and Julia Jacobs, and they and their guardian alone are plaintiffs in error here.

There is also living, Sam Johnny, a son of Julia by a former husband. This Sam Johnny is not named in the patent. (Trans. of Record, original p. 51, printed p. 23).

On March 7, 1898, Charley Jacobs, Julia and Frank, all of age and named in the patent, executed and acknowledged a written agreement of consent to sell, appointing Commissioner Snowden trustee to sell the lands in controversy in accordance with the act of March 3, 1893, and on August 29, 1898, Charley Jacobs, as guardian of Oscar Jacobs, a minor named in the patent, executed a similar agreement of consent, and on October 7, 1898, Charley Jacobs, as sole heir of his deceased sister, Annie, named in the patent, executed a similar agreement of consent. (Trans. of Record, original pp. 42 and 43, printed pp. 23, 24 and 25). The appraisement papers, schedules, and these agreements of consent were then forwarded by Commissioner Snowden to the Secretary of the Interior and were approved

by the Secretary on February 20, 1899. (Trans. of Record, original p. 43, printed p. 25).

On January 26, 1900, Charley Jacobs died, leaving the above named persons surviving him as his heirs. His death was reported to the Department of the Interior by Mr. Snowden on May 1, 1900. In September, 1900, Julia died, leaving surviving her Frank, Oscar, her son, Sam Johnny, and Lillie and Ruther, as all her heirs. (Trans. of Record, original pp. 45 and 46, printed p. 27).

The Commissioner, Mr. Snowden, requested instructions from the Secretary of the Interior in regard to a case of this nature, and was by letter of date January 18, 1901, instructed as follows:

"Where allottees and true owners of Puyallup lands have executed their consents of sale, the same having been approved by the Secretary, it has been the practice of the Department to continue the sale of the lands covered thereby in the case of the death of an allottee or true owner and to distribute the funds arising from such sale to his or her heirs. The office and the Department have regarded these written consents as remaining in full force and effect upon the decease of the Indian executing the same—and further, that they are, as above indicated, in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease. * * * These lands are sold under the provisions of the Act of Congress, March 3, 1893, and not under the laws of the State of Washington. * * * It is for the Department to pass upon the sufficiency of consents and not the courts of the State of Washington." (Trans. of Record, original pp. 40 and 41, printed p. 23).

After receiving these instructions and before sale was made, Mr. E. D. Wilcox was appointed by

the Superior Court of Pierce County, Washington, guardian of the plaintiffs in error, Lillie and Ruther, the appointment being made on February 6th, 1901. (Trans. of Record, original p. 46, printed p. 27).

On February 27, 1901, pursuant to the foregoing instructions and after Mr. Wilcox was appointed guardian, Commissioner Snowden sold the premises at public sale to defendant in error for $1250.00, he paying one-third cash, the remainder to be paid in five equal yearly payments, with 6 per cent. interest, and Mr. Snowden executed and delivered to defendant in error a Commissioner's deed, the same to become absolute when payments were made. This deed was in the general form of such deeds and was recorded April 25, 1901, in the office of Indian Affairs, and on March 17, 1903, in the Auditor's Office of Pierce County, Washington. (Trans. of Record, original pp. 43, 44 and 45, printed pp. 25, 26 and 27).

Defendant in error paid a fair price for the property; he paid the cash payment and the first year's payment due in 1902, and before the commencement of this action paid all the remaining payments. These payments were all made to the Interior Department, and were accepted for distribution to those entitled to receive them. They were distributed by the Department, Mr. Wilcox receiving the share of his wards, the plaintiffs in error, Lillie and Ruther, of the cash payment and the 1902 payment, but after this suit was brought in December, 1905, he then refused to accept the subsequent payments and tendered back for his

wards the amounts he had already received. (Trans. of Record, original p. 46, printed pp. 27 and 28).

Mr. Wilcox, as guardian of plaintiffs in error, Lillie and Ruther, in his various reports recited this sale and the receipt of the proceeds thereof, but claims not to have known that Charley and Julia had died before the sale was consummated, and claims only to have learned that fact after this suit was commenced. (Trans. of Record, original p. 47, printed p. 28). Yet the fact remains that he was appointed guardian of Lillie and Ruther on account of the death of their father and mother on February 6, 1901, twenty-one days before Mr. Snowden made this sale at public auction to defendant in error, and a slight examination of the records when he was receiving the money and preparing his reports would have advised him of these facts. It further appears that he acted as Notary in taking acknowledgements of allottees to the agreements of consent for sale.

Defendant in error bought at public auction and when he made the purchase knew nothing of the death of Charley and Julia or of the existence of plaintiffs in error, Lillie and Ruther, or that they claimed an interest in the property. He made no investigation, but relied on the representations of Mr. Snowden, and in the full belief of the regularity of his proceeding, and only learned of the apparent cloud upon his title shortly before bringing this suit. He purchased in good faith and for a fair consideration. (Trans. of Record, original p. 47, printed p. 28).

The facts of this case were submitted to the Interior Department for an opinion, and the De-

partment, after reviewing the facts submitted, and which are as hereinbefore set forth, gave its opinion as follows:

"In reporting on this subject, I have the honor to invite attention to Office report of October 3, 1895, transmitting one from the Puyallup Commissioners of August 28, that year, in which they said that in several instances Indians who had given their consent to the sale of parts of their allotted lands, had revoked or attempted to revoke the consent given, for certain reasons.

"The Office said that in view of the fact that the Puyallup lands were under the control of the Government, that Congress had authorized their disposal on certain terms, conditions, stipulations and restrictions; that the Indians had consented in the manner provided by law to the sale of a part of their respective allotted lands; that they had been appraised by the Puyallup Commissioners, and the appraisement approved by the Department, and sales thereof authorized, it was clearly of the opinion that Indians who had given their written consent in the manner and for the purpose stated, could not revoke or annul them without the consent and authority of this Department, and in consideration of the premises it is recommended that the Commissioners should be instructed to proceed with the sale of such lands in accordance with former instructions from the Department.

"On October 17, 1895, the Secretary of the Interior said that the consents of the Indians referred to were obtained by the mode prescribed by the law providing for the sale of their lands, and that having thus regularly given their consent, he was of the opinion that they could not legally withdraw it except for some good and valid reason, which did not appear to be the case with those then in question; that if the lands which these Indians had

authorized to be sold, or parts of them, were necessary for their maintenance, or had been appraised at less than their market value, or at less valuation than they were willing to take for them, then their objections to the sale could be removed by the Commission by offering smaller parts of their allotments for sale, or by a reappraisement to meet the views of the allottees.

"The Office and the Department have uniformly held that the death of an allottee did not revoke his written consent of sale; that such consent was something more than a mere power of attorney; that it was in the nature of a trust, to be carried out in case of his death, for the benefit of his legal heirs. The Puyallup Commission was made a trustee by the respective written consents executed by the allottees and true owners of Puyallup allotted lands, to sell and convey the lands for which consent of sale had been given. Such written consents were regarded as in the nature of a written agreement of contract, whose terms and conditions should not be allowed to fail of performance or execution by reason of the death of the Indian allottee or true owner. The provisions of the Puyallup Act *(supra)* appear to be sufficient to justify the course which the Department has taken in this matter, to which special attention is invited, and to convey good title to lands sold thereunder." (Trans. of Record, original pp. 48, 49 and 50, printed pp. 29, 30 and 31).

The land in controversy since the defendant in error bought, has, with similar lands in this locality, greatly increased in value, and at the time the suit was commenced was worth $25,000. (Trans. of Record, original p. 50, printed p. 31). But when purchased by defendant in error he paid the fair value and bought at public sale. (Trans. of Record, original p. 47, printed p. 28).

The trial court found for the plaintiff, defendant in error here, and rendered a decree quieting his title to the land in controversy. (Trans. of Record, original pp. 26, 27 and 28, printed pp. 13 and 14). On appeal of the defendants (plaintiffs in error here) the Supreme Court of the State of Washington affirmed the decree of the trial court in an opinion filed July 9, 1907. (Trans. of Record, original pp. 52 to 60 inclusive, printed pp. 32 to 38 inclusive).

ARGUMENT.

It may be conceded that the allottees named in the patent from the United States took a base or qualified fee simple title subject to temporary restrictions on the right of alienation as held by the Supreme Court of the State of Washington in passing upon a similar patent.

Guyatt vs. Kautz, 41 Wash., 115.

The question here presented for determination, however, is not what title Charley Jacobs, as head of a family consisting of himself, Julia, Annie, Frank and Oscar, took under the patent to him as such head of family on January 30, 1886, but what was the nature and effect of the written agreement of consent executed by the allottees on March 7, 1898, to Clinton A. Snowden, the Puyallup Indian Commissioner, appointing him trustee to sell the land in question under the provisions of the acts of March 3, 1893, and June 7, 1897. It is conceded that the act of June 7, 1897, is in all respects similar to the act of March 3, 1893, except that it reduces the number of Commissioners to one instead of three. (Trans. of Record, original p. 40, printed p. 22). It

is conceded that the heirs of said allottees are entitled as such heirs to their proportionate part of the proceeds of the sale. No one questions their right to take as heirs. The sole question is, was the written agreement of consent which was executed under the terms of the act of March 3, 1893, revoked by the death of the original allottees who executed it, or was it still in force on the day of sale? Does the act of March 3, 1893, contemplate the execution of successive agreements of consent, or were its terms complied with by the execution of the one agreement of consent provided for in said act, by the original allottees? This is the question to be determined, and it seems useless to enter into a discussion as to the character of the title conveyed by the patent since it is conceded by all that whatever the heirs of the original allottees took—whether land, or money as the proceeds of the sale of the land—they took as heirs and not otherwise.

It must be borne in mind that the United States Government was not under any obligations to patent these lands to the Indians. Its determination so to do was voluntary and was an act of gratuity. And it therefore had the power to place any condition it might see fit in the grant. It could either withhold absolutely the power of alienation or reserve the power or trust to itself to determine when and how that right, if conferred, might be exercised.

"When a state conveys land as a bounty it can impose any restriction deemed proper upon the grantee."

Eells vs. Ross, 64 Fed. Rep., 417-421.

The restriction of alienation was a valid restric-

tion, in no wise inconsistent either with the estate granted or with the citizenship of the Indian.

Smythe vs. Henry, 41 Fed. Rep., 705-707.

Libby vs. Clark, 118 U. S., 250; 30 Law Ed., 133.

The patent issued on January 30, 1886, prohibited, absolutely, alienation for a longer period than two years. The power to confer that right could not be exercised by the State Legislature without the consent of Congress. The ultimate power to confer that right was reserved by the government to itself, by the very terms of the grant, to be exercised when and in such manner as Congress might see fit to direct. (See copy of patent, Trans. of Record, original pp. 34 and 35, printed pp. 18 and 19).

Congress, in pursuance of the power reserved in the patent itself, did, by the act of March 3, 1893, confer the power of alienation and prescribe the manner of its exercise. The Government had reserved this power in the patent itself, and we believe that the courts have no authority to invoke any technical rules of conveyancing to change or modify the manner in said act provided.

"The sovereign power of the Legislature is superior to the immemorial rules and usages of the common law. The legislative power of the state is restricted only by the State and Federal Constitutions, and it may change the rules of the common law whenever such alterations are deemed best for the general welfare, and do not conflict with the constitutional rights of citizens."

Smythe vs. Henry, 41 Fed. Rep., 705-707.

The act in prescribing the manner of alienation defines the duties of the Commissioner as follows:

"* * * to select and appraise such portions of the allotted land as are not required for homes for the Indian allottees. * * * and if the Secretary of the Interior shall approve the selections and appraisements made by said commission, the allotted land so selected shall be sold for the benefit of the allottees after due notice at public auction, at not less than the appraised value for cash, or one-third cash and the remainder on such time as the Secretary of the Interior may determine, to be secured by a vendor's lien on the property sold; to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money, and the whole amount received for the allotted land shall be placed in the treasury to the credit of the Indian entitled thereto, and the same shall be paid to him in such sums and at such times as the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, shall direct. * * * That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission, for a period of ten years from the date of the passage of this act, and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof. * * * The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed

to make all necessary regulations to carry out the purpose of the foregoing provisions." (Trans. of Record, original p. 38, printed p. 21).

The whole argument of the plaintiffs in error may be summed up in the contention that the written agreement of consent of sale constituting the commissioner a trustee, is nothing more than a naked power of attorney; that, therefore, it was abrogated by the death of the original allottee, and that the commissioner was not authorized to make a sale without securing a new agreement of consent from the heirs of such deceased allottee. We believe that this contention finds no reasonable support in the terms of the above statute. It will be noted that the words "power of attorney" are not once used in the act. The office of a power of attorney is well understood, and its use where appropriate is much employed by the executive departments of governments. A power of attorney would not be appropriate here because the original allottee himself could not convey. Therefore, he could not, by power of attorney, delegate a power to convey which he himself did not possess.

If a mere power of attorney, revocable at will and abrogated at death, was all that had been intended, the agreement of consent contemplated by the act would have been so defined. In this act it is not so defined, but that something more—something in the nature of a permanent power or trusteeship—was intended, is clearly shown by the act itself. The act plainly recognizes the fact that the United States has reserved the power to act as trustee for the Indians so far as the matter of alienation is concerned, notwithstanding the fact that the

land had been allotted in severalty. The fact that the restrictions on alienation could not be removed without the consent of Congress, as set out in the patent itself, shows that the United States reserved to itself and to this extent, this power or trusteeship for the allottees and their heirs, and this is further shown by the terms of the Sixth Article of the Treaty with the Omahas referred to in said patent. (Trans. of Record, original pp. 36 and 37, printed pp. 19 and 20).

Eells vs. Ross, 64 Fed. Rep., 417-420.

This reserved governmental power or trusteeship is further borne out by the fact that the act of 1893 requires the commissioner, even after the allottees have executed the contemplated agreement of consent, to report all his doings to the Department of the Interior, and that deeds executed under such agreement of consent shall not be valid until approved by the Secretary of the Interior. The provision in the statute requires only that the one written agreement of consent to the alienation be executed by the allottees or the guardian of any minor allottee. It does not provide for or in terms require any additional or successive consents from the heirs of deceased allottees. While it empowers the commissioner to secure the appointment of guardians for minor heirs of deceased allottees, there is nothing in the act requiring the consent of such guardian to the alienation, but only the consent of the allottees themselves or their guardian in case they are minors. The Government having thus reserved the right to prescribe the mode of alienation in the grant itself, and having provided this mode without requiring the consent of any heirs of de-

ceased allottees, the courts are without authority to add that provision, which Congress, to which the power was reserved, has not seen fit to make. It would seem plain, therefore, that when once this consent has been given by the allottees named in the patent, the consent is in the nature of an agreement or contract to be carried out by the Government through the Department of the Interior for the benefit of such allottees and their heirs. This agreement of consent merely invokes the reserved power or trust in the Government to act for the Indian and his heirs, and when consent is once given it cannot be revoked by the death of the allottee, since it is not in the nature of a power of attorney, but only a means of invoking the exercise of the power or trust reserved by the patent itself to the Government. The duty then devolves upon the Government through the Commissioner and the Department of the Interior to collect the money on the sale, ascertain the heirs of any deceased allottee, appoint guardians for any minor heir and distribute the money according to their rights as heirs. The appointment of guardians for minor heirs of deceased allottees can only be for the purpose of distributing the moneys arising from the sale. It is not for the purpose of executing the original agreement of consent antecedent to the sale. Nowhere in the act is any such purpose expressed. The contrary is plainly implied.

The Department of the Interior has universally, in all its dealings with the Puyallup Indians and these Indian lands, construed this act as above indicated. This was declared in the letter of July 2, 1897, to Clinton A. Snowden, quoted in our state-

ment of the case and found in the Transcript of Record, original p. 40, printed pp. 22 and 23, and again in the letter of the Secretary of the Interior to Commissioner Snowden, dated January 18, 1901, also quoted in our statement of the case, and in the Transcript of Record, original pp. 40 and 41, printed p. 23, in which letter the Secretary says:

"The Office and the Department have regarded these written consents as remaining in full force and effect upon the decease of the Indian executing the same—and further, that they are, as above indicated, in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease. * * * These lands are sold under the provisions of the Act of Congress of March 3, 1893, and not under the laws of the State of Washington. * * * It is for the Department to pass upon the sufficiency of these consents and not the courts of the State of Washington."

This is a clear statement of the construction of the Department as to the meaning of this act. The last clause—that it is for the Department to pass upon the sufficiency of consents—is certainly correct, since the act itself requires that all proceedings, appraisements, sales and deeds be submitted to the Department of the Interior, passed upon by it, and approved by it before they shall have any validity, the act expressly declaring that when deeds are issued under sale, the deeds must be approved by the Department and shall have no validity until so approved, and directs the Secretary of the Interior to make all necessary regulations to carry out the foregoing provisions. What clearer reservation of full power to the Department of the Interior to pass upon the deed and all steps leading up to it, could be indicated?

It would seem to be an exercise of power not contemplated by the act under which alone these sales were made possible, for the courts to hold that they have any power to pass upon these consents in the absence of fraud.

The sufficiency of the consents being referred solely to the Department of the Interior by the act itself, it would seem that in the absence of fraud its decision should be final.

In connection with this very case, the Department of the Interior, after reciting the facts, again, in a letter of February 15, 1906, declares as follows:

"The Office and the Department have uniformly held that the death of an allottee did not revoke his written consent of sale; that such consent was something more than a mere power of attorney; that it was in the nature of a trust to be carried out in case of his death, for the benefit of his legal heirs. The Puyallup Commission was made trustee by the respective written consents, executed by the allottees and true owners of Puyallup allotted lands, to sell and convey the lands, for which consent of sale had been given. Such written consents were regarded as in the nature of a written agreement of contract, whose terms and conditions should not be allowed to fail of performance or execution by reason of the death of the Indian allottee or true owner. The provisions of the Puyallup Act *(supra)* appear to be sufficient to justify the course which the Department has taken in this matter, to which special attention is invited, and to convey good title to lands sold thereunder." (See copy of letter in full, Trans. of Record, original pp. 48, 49 and 50, printed pp. 29, 30 and 31).

In view of these repeated statements from the Department of the Interior, made a part of the

agreed statement of facts, on which this case was tried, that such had been the universal treatment of these Puyallup Indian lands wherever a similar situation arose, there is certainly no warrant for the contention that there is no evidence that it has become an established rule of the Department. The Department in these letters declares that it has uniformly held that the death of an allottee did not revoke his written consent of sale. Such being the uniform holding and practice of the Department of the Interior, which is the Department to which the statute by its express terms has entrusted the execution of its provisions, it would seem that the courts would be slow to put a different construction upon the statute, since the construction given by the Department of the Interior has become a rule of property universally applied in all such cases to these Puyallup Indian lands. The court should be especially slow to adopt a different construction when the terms of the statute warrant the construction given it by the Department. A careful reading of the statute will show that the most obvious meaning of the terms used therein is in accordance with the construction given to it by the Department.

The courts have universally held that where a statute entrusted the carrying out of its own provisions to one of the Executive Departments of the Government, the interpretation of the statute by such department will be followed by the courts unless there are most cogent reasons to the contrary. The decision of the Supreme Court of Washington in this case is so clear a statement of our position that we quote a part of it:

"It is argued by appellants that the written

consent had no further force than that of an ordinary naked power of attorney, and that inasmuch as Charley and Julia died after the consent was given and before the sale was made, the power was thereby annulled, and the sale rendered void. The words "power of attorney" are not used in the Act of Congress prescribing this method of alienation. The office of a power of attorney is well understood. If a mere power revocable at will or by death was intended, it would seem that the agreement for alienation would have been so defined. We think it manifest from the act itself that such was not intended. It plainly appears that the Government recognized the fact that it had reserved the power to act as trustee for the Indians, so far as alienation was concerned, notwithstanding the allotment in severalty. The statute requires but one consent from an allottee, and it does not in terms require that when an allottee dies after consent is given and before sale, that his heirs must also consent. It empowers the commissioner to procure the appointment of guardians for minor heirs of deceased allottees, but that is manifestly for the purpose of effecting a proper distribution of the proceeds of a sale made in pursuance of a consent once duly given by the allottee himself. We think the consent intended by the Act of Congress is in the nature of a contract to be carried out through the Department of the Interior for the benefit of the allottee and his heirs. The consent invokes as a finality the exercise of the reserved trust held by the Government, and when given it is not revocable by death of the allottee, but continues in force as an incident to the exercise of the power reserved by the patent itself to the Government. The Government discharges this trust by completing the alienation of the lands as agreed by the allottees, and then distributes the proceeds to the allottees or their heirs, if the allottees have in the meantime died.

"As a matter of original construction the Act of Congress is easily susceptible of the above interpretation, and to us it seems to be a reasonable interpretation. We have also seen from the recital of the facts considered by the trial court, that the Department of the Interior has in all its dealings with the Indians so construed the law. It is the general rule that, when a statute entrusts the carrying out of its provisions to the Executive Department, its interpretation by that department will be followed by the courts, unless there are cogent reasons to the contrary." (Trans. of Record, original pp. 58 and 59, printed pp. 37 and 38).

Prichard, Trustee, vs. Ruther Jacobs, et al., 46 Wash., 562-570-571.

The foregoing is amply sustained by authority. In the case of Eells vs. Ross, where the question arose as to whether the treaty with the Puyallup Indians, allotting reservation lands in severalty, and the act of 1887, conferring citizenship upon the Indians, had abolished the reservation, the Federal Court in declaring that the Indian Reservation still existed and was not abolished, says:

"Besides, the practice of the Department has been and is to maintain them, and this practice is respectable evidence of the correct interpretation of the statute by officers who may have suggested the policy and written the provisions of the statute."

Eells vs. Ross, 64 Fed. Rep., 417-420.

Language more appropriate than the language here used could hardly be applied touching the statute now in question. This same rule of construction has been applied almost universally by the Supreme Court of the United States.

In construing an act relative to pay of passed assistant surgeons, the court says:

"The construction given to the statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are draftsmen of the laws they are afterwards called upon to interpret."

United States vs. Moore, 95 U. S., 760-764; 24 Law Ed., 588-589.

In construing an act of North Carolina of 1782, where the Commissioners had determined that French Lick was within the reservations of the statute, the Supreme Court of the United States says:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

Edwards, Lessee, vs. Darby, 12 Wheaton (U. S.), 206; 6 L. Ed., 603-605.

In passing upon a statute, the carrying out of the provisions of which was entrusted to the Navy Department, the Supreme Court says:

"It must be conceded that were the question a new one, the true construction of the section would be open to doubt, but the findings of the Court of Claims show that soon after the enactment of the Act the President and the Navy Department construed the section to include the warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and

that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale."

Brown vs. United States, 113 U. S., 568-574; 28 Law Ed., 1079-1080.

In another case a special act purported to grant to the State of Louisiana all swamp and overflow land therein and provided that on approval of a list of such land by the Secretary of the Treasury (afterwards succeeded by the Secretary of the Interior) the fee simple title to the same should vest in the State. It was contended that a subsequent act granting swamp lands to the State of Arkansas, which provided that on patent the fee simple should vest in the state, and which also extended the provisions of said act to other states of the Union having swamp lands, abrogated the vesting of title of the Louisiana swamp lands by approval only. The Supreme Court of the United States said:

"It is argued that this so far repealed the special act of 1849 that thereafter the title would not pass on simple approval, as provided therein, but a patent was necessary. As we understand, the continuous construction of the Department has been to the contrary, and a great number of titles to a very large amount of land would be disturbed if we should accede to this argument. We see no reason for overthrowing the long continued understanding that the special provisions for Louisiana were not affected by a general clause, evidently intended to extend benefits to states that did not enjoy them at the time, not to change the mode of conveyance previously established in a case where the benefit already had been conferred."

Louisiana vs. Garfield, 211 U. S., 70-78; 53 Law Ed., 92-96.

In construing an act entrusted to the Treasury Department for execution, the Supreme Court says:

"This construction of the Department has been followed for many years, without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the Government to question its correctness, except in the present instance. The regulation of a department of the Government is not of course to control the construction of an Act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

Robertson vs. Downing, 127 U. S., 607-614; 32 Law Ed., 269-271.

In construing the statute relative to priority of debts due the United States, the court says:

"It is not unimportant to state that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general, would of itself furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs."

United States vs. State Bank of North Carolina, 6 Peters (U. S.), 29-40; 8 Law Ed., 308-312.

"In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

Schell vs. Fauche, 138 U. S., 562-573; 34 Law Ed., 1040-41-43.

United States vs. Cerecedo Hermanos Y Compania, 209 U. S., 337-339; 52 Law Ed., 821-822.

The Hastings & Dakota R. Co. vs. Whitney, 132 U. S., 357-366; 33 Law Ed., 363-367.

United States vs. Burlington & Mo. River R. R. Co. in Nebraska, 96 U. S., 334; 25 Law Ed., 198-201.

United States vs. Pugh, 99 U. S., 265-272; 25 Law Ed., 322-324.

Hahn vs. United States, 107 U. S., 402-406; 27 Law Ed., 527-529.

Smythe vs. Fiske, 23 Wall (U. S.), 374-383; 23 Law Ed., 47-50.

United States vs. Johnson, 124 U. S., 236-255; 31 Law Ed., 389-396.

United States vs. Finnell, 185 U. S., 236-254; 46 Law Ed., 890-893.

United States vs. Alabama Great Southern R. R. Co., 142 U. S., 615-622; 35 Law Ed., 1134-1136.

United States vs. Philbrick, 120 U. S., 52-59; 30 Law Ed., 559-561.

Stuart vs. Laird, 1 Cranch (U. S.), 299-309; 2 Law Ed., 115-118.

State courts have likewise often followed this same rule in construing statutes. The Supreme Court of the State of Washington in passing upon the rights of claimants under the Dominion Act and the Porterfield Relief Act, uses the following language:

"The statute having been thus construed by the Executive Department of the Government, and innocent parties having acquired rights under that construction, those rights ought not to be divested, unless it clearly appears that the construction was wrong."

McSorley vs. Hill, 2 Wash, 638-651.

"All these statutes have been construed by those whom the law specially appointed to construe and execute them, and it is a principle well recognized by the courts that the construction given to statutes by those charged with the duty of executing them should not be overruled without cogent reasons."

Keane vs. Brygger, 3 Wash., 338-350-351.

"The practical construction given to a doubtful statute by the department or officers whose duty it is to carry it into execution, is entitled to great weight and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous."

Sutherland on Statutory Construction (2 Ed.), Sec. 474, quoted with approval in *State ex rel. Smith vs. Ross,* 42 Wash., 439-445.

Blair vs. Brown, 17 Wash., 570-573.

The Supreme Court of Wisconsin holds that a uniform construction by the department to which

an act is referred for the carrying out of its provisions, will be followed by the courts even when the courts would not have so construed the act in the first instance.

Herrington vs. Smith, 28 Wis., 68.

Bloxham vs. Consumers Electric Light & Street Railroad Co. (Fla.), 18 So. Rep., 444-446-447.

Copper Queen Consolidated Mining Co. vs. Territorial Board of Equalization (Ariz.), 84 Pacific Rep., 511-516.

Van Veen vs. Graham County (Ariz.), 108 Pac. Rep., 252-253.

Many other authorities, both Federal and state, to the same effect might be cited, but the foregoing are certainly sufficient to show that in all cases where a statute by its own terms entrusts the execution of its provisions to the executive, or any of the executive departments, and especially when the statute has been inspired and probably drawn by that department, that the construction placed upon it by such department and uniformly acted upon by such department, will not be overthrown or changed by the courts without the most cogent reasons therefor; in fact, as indicated by the authorities, not unless such construction is in conflict with the constitution or the plain intent of the act itself. Every ambiguity in the statute will be resolved in favor of the construction placed upon it by the department.

In the case here presented there is certainly no good reason for adopting any other construction than that so long followed by the Department of the Interior. The agreement of consent having once

been given the sale is carried out according to the terms of the statute, and even though the original allottee may be dead at the time of the sale, the department is empowered to ascertain his heirs and distribute to them the money arising from the sale. In other words under the statute the original agreement of consent invokes the reserved power of the government and creates a trust which when carried out by the Commissioner and the Department by the collection of the money under the sale and its distribution to all the parties interested, meets the spirit and intent of the statute, protects the interests of all allottees and their heirs, whether minors or adults, and in addition to this prevents loss to purchasers who have acted in good faith in their dealings with the Department. This construction also meets the spirit and intent of the Sixth Article of the Treaty with the Omahas under the terms of which the patent was issued and which reserves to the government the right through the Department of the Interior and the Indian Commissioner to conduct sales of allotted lands.

There is no shadow of a conflict of the rulings of the department with the laws of the State of Washington. The department in determining who are the heirs entitled to a distribution of the proceeds of the sale, follows the law of descent of the State of Washington. The only thing necessary, therefore, to decide is that this United States Statute and the Sixth Article of the Omaha Treaty when construed in connection with the patent, does not make the agreement of consent of sale a mere power of attorney subject to revocation by death of the original allottee who executes it, but makes such agreement of consent a contract creating the Commissioner, under

the direction of the Department of the Interior, a trustee to carry out the sale for the benefit of the allottee or for the benefit of his heirs in case of his death before the sale is completed and the money paid. Such a construction is clearly within the power reserved to the government by the patent itself, clearly within the terms of the Sixth Article of the Omaha treaty, and does no violence to the statute of 1893, but obviously meets its spirit and intent and since it has been adopted from the beginning by the officers entrusted with the carrying out of the provisions of the statute it has become a rule of property, and if now abrogated by the courts would lead to needless confusion without any compensating good and without meeting the terms and spirit of the statute, the patent and the treaty as nearly as the construction of the department has done.

The act of 1893 expressly states that the Secretary of the Interior "is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions." This leaves every ambiguity, if there be any, as to the practical application of the act, for the Department of the Interior alone to solve, and would seem to make its solution final. The rule of the Department holding that the agreements of consent of the original allottees are not mere powers of attorney revoked by death, was necessary to the practical carrying out of the manifest purposes of the act. The sole inquiry, therefore, is, has the trust imposed on the government by the Omaha Treaty, reserved to the government in the patent, assumed by the government in the act of 1893, been properly carried out, and have the purposes of the act been fairly met?

It is conceded that the land was sold for its fair value; it is conceded that the purchaser has paid the price; it is conceded that the department has fairly examined and approved all steps leading up to the deed and that the purchaser took his deed relying upon the department, to which the act itself entrusted the execution of its provisions, as having done its duty in the premises. The purposes of the act have been fully met; viz: the protection of the Indians from improvident sales.

It makes no difference that Charley Jacobs was a citizen of the United States. True, he became a citizen by the act of 1887, after his patent had issued, but that fact did not change the character of the title conveyed by the patent nor did it abrogate the power reserved to the government in the patent and by its reference to the Sixth Article of the Treaty with the Omahas. There is no authority for the contention that a citizen cannot hold a base or qualified title. There is ample authority for the converse.

In construing this very act of 1887, which conferred citizenship on the Indians, the Federal Court says:

"It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to with-hold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians who have always been regarded as wards of the government. Citizenship does not carry with

it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held."

Beck vs. Flourney Live-Stock & Real Estate Co., 65 Fed. Rep., 30-35.

Eels vs. Ross, 64 Fed. Rep., 421.

Smythe vs. Henry, 41 Fed., 705.

United States vs. Flourney Live-Stock & Real Estate Co., 71 Fed Rep., 576-579.

Since, as has been shown, the agreement of consent of sale executed by the original allottees was not a mere power attorney, but was in the nature of an agreement or contract invoking the power reserved to the United States in the patent itself, it is plain that a trust for the allottees and their heirs was created not by agreement of consent alone, but by the patent, the treaty referred to in the patent, the act of March 3, 1893, and the agreement of consent combined. The patent reserved the power or trust in compliance with the provisions of the treaty, the act of 1893 prescribes the manner of its exercise and the agreement of consent invokes the power through the medium of the Commissioner as trustee under the direction of the Department of the Interior as provided by the act of 1893.

It seems clear, therefore, that the authorities relied upon by the plaintiffs in error are not applicable. They define a mere naked power of attorney and simple agencies. Here we have a power reserved in the patent to invoke a trust in the manner prescribed by the act of 1893. The trusteeship is referable to the patent itself, and to the treaty provision

referred to in the patent in the first instance. It is that very fact which makes the estate conveyed by the patent a base or qualified fee title as held in the case of *Guyatt vs. Kautz*, 41 Wash., 115.

A case closely analogous is presented in *Pickering vs. Lomax*, 145 U. S., 310-316; 36 Law Ed., 716-719 (again in 43 Law Ed., 601). There the grant to the Indians provided that lands granted thereby in severalty should never be conveyed by the grantees or their heirs without the permission of the President of the United States. The Indian Grantee executed a deed and thirteen years thereafter the deed was approved by the President. The court held that the deed was thereby made effective as against a subsequent grantee of the Indian. In that case the power of the President was referable to the reservation in the original grant and might be, therefore, exercised when invoked by the deed of the original grantee, just so here the power of the Indian Commissioner and the Department of the Interior was referable to the reservation in the original grant and on compliance with the act of 1893 was invoked by the agreement of consent of the original grantee notwithstanding his death in the meantime.

See also *Lykins vs. McGrath*, 184 U. S., 169 (46 Law Ed., 485).

The opinion in this case was by Justice Brewer and the syllabus, which is borne out by the text, is as follows:

"Consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian

grantor, and when so given is retroactive in its effect, and relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land."

In this case the patent had issued, the act of March 3, 1893, had been enacted, the Commissioner had been appointed under the act, the land had been selected and appraised as provided by the act, the allottees had executed the agreements of consent of sale and trusteeship prescribed in the act; all these papers and proceedings had been transmitted to the Department of the Interior and approved by the Department prior to the death of the Indians Charley and Julia Jacobs. The ministerial acts of securing deeds, collecting the money and executing the deed remained alone to be performed. The full purpose of the act had been met, the trusteeship for this purpose was complete.

The fact that this land has advanced in value since the sale, is no reason whatever for now seeking to so construe the statute as to invalidate the title of the defendant in error. As shown by the agreed statement of facts on which this case was tried, he has paid the fair value for the land at the time of the sale. The stipulation on this point being as follows:

"That plaintiff purchased the premises in good faith and paid a fair consideration for the same." (Trans. of Record, Original, p. 47, printed, p. 28).

It is probably true that all the Indian lands in the Puyallup Reservation have greatly advanced in value since their sale by the Commissioner, but that furnishes no better argument for setting aside the

sale in this case than in any other sale of these Indian lands, even where the original allottee is still alive. To allow such advance any weight would be to invite speculative attacks on all Puyallup Indian titles.

The sole question is, has the Department of the Interior fairly carried out the power reserved in the patent, contemplated by the treaty, provided for by the statutes, and finally invoked by the agreement of consent signed by the original allottees. If it has, the title given is valid and we submit that there is nothing in the agreed statement of facts herein to cast the slightest doubt upon the good faith and regularity of the proceedings of the Commissioner and the Department of the Interior, or upon the good faith of the defendant in error in this case. His title should be quieted.

Since the decision in the case at bar, the Supreme Court of the State of Washington has passed upon the same question, and followed this decision in the case of

Little Bill vs. Swanson, Advance Sheets, Vol. 117, Pacific Reporter No. 4, p. 481.

Little Bill vs. Dyslin, Advance Sheets, Vol. 117, Pecific Reporter No. 4, p. 487.

See also on question of Indian lands and the government supervision over the same,

Cherokee Nation vs. Hitchcock (U. S.) 47, Law Ed., p. 183.

Starr vs. Campbell (U. S.) 52 Law Ed., 602.

Marquez vs. Frisbie (U. S.) 25 Law Ed., 800.

The judgment of the state court is correct. The writ of error should be dismissed.

Respectfully submitted,

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JACOBS *v.* PRICHARD, TRUSTEE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 93. Submitted December 8, 1911.—Decided February 19, 1912.

In allotting Indian lands, Congress can determine the conditions under which they shall be alienated by the allottees, and titles resting on deeds of Commissioners and consents of the allottees required by the statute under which the lands were allotted are to be determined by the Federal statute, and not by the laws of the States.

Under the act of March 3, 1893, 27 Stat. 612, c. 209, and the amendatory act of June 7, 1897, 30 Stat. 62, c. 3, carrying out the treaty with the Omaha Indians of 1854, the consent required to be given to the Commissioner for sale of land of allottee Indians in the Puyallup Reservation in Washington was not a mere power to sell

which terminated with the death of the giver, but an agreement which continued in force after death.

The rule that where ambiguity exists courts will follow the construction placed on a statute by the Department charged with its execution is strengthened where the statute itself directs such Department to make the necessary regulations to carry it into effect.

Habits of Indian life will be considered in construing a statute providing methods for a sale of Indian lands, and it will not be presumed that Congress would insert therein a condition which defeats an approved sale by the death of a roving Indian before the delivery of the deed.

46 Washington, 562, affirmed.

THE facts, which involve the title to lands in the Puyallup Indian Reservation allotted under the treaty with the Omaha Indians and the acts of March 3, 1893, and June 7, 1897, are stated in the opinion.

Mr. W. H. Doolittle, with whom *Mr. E. D. Wilcox* and *Mr. Jesse Thomas* were on the brief, for plaintiffs in error:

It is immaterial in this case whether or not the Department has construed the so-called consent to be something more than a naked power to sell, as this is a question of law, and not of fact, and while the findings of the Department of the Interior, especially the Land Department and its various branches, are held to be binding on questions of fact, no such rule can be found as to questions of law on rulings made by officers of the departments of the Government. *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *Shepley* v. *Cowen*, 91 U. S. 330; *Johnson* v. *Towsley*, 13 Wall. 72; *Quimby* v. *Conlan*, 104 U. S. 420.

The regulation of a department of the Government is not to control the construction of an act of Congress when its meaning is plain. *Robertson* v. *Downing*, 127 U. S. 402.

Even if there was trust created in the commission to sell this land, it is not a trust coupled with an interest, and it would not survive.

The Indians gave up their claims to other land and took this in payment, and after the issuance of the patent to an individual, it was his absolutely and for value given. *Lykins* v. *McGrath*, 184 U. S. 169.

The consent was a naked power to sell, and, where, as in the case at bar, no sale was made during the period of ownership by the giver of the consent, the power terminated. The title to the land had passed from the United States by its patent and the commissioners were only agents of the Indian to sell the land. No sale having been made there was nothing to continue in force after death, as the land, after the death of the allottee, was the property of another. Under the act of Congress of 1887, 24 Stats. 388, the laws of the State of Washington govern the descent of this land. See Session Laws of 1895, § 1, p. 197.

As to the construction of the acts of 1893 and of 1897 in their application to the Puyallup Indians and their lands, see *United States* v. *Kopp*, 110 Fed. Rep. 160; *Goudy* v. *Meath*, 38 Wisconsin, 129, aff'd in *Goudy* v. *Meath*, 203 U. S. 146; *Wa-la-note-tke-tying* v. *Carter*, 53 Pac. Rep. 106; *Re Huff*, 197 U. S. 488.

After the death of the parents in order to divest these heirs of their title to the land one of two things must appear: First, that the plaintiffs in error, having power to do so, have conveyed the land; which it is nowhere claimed they have done; or second, that the paper executed gave some right or authority to the commissioner that survived the giver. The instrument of March 7, 1898, is of no greater power or authority than an ordinary power of attorney, and is subject to the same rules and restrictions. *Hunt* v. *Rousmanier's Admstrs.*, 8 Wheat. 174.

The power of an agent ceases on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to

the agent, the act is void. *Glat* v. *Galloway*, 4 Peters, 332; *McCasky* v. *Barr*, 50 Fed. Rep. 712; *Frink* v. *Roe*, 70 California, 296; *Staples* v. *Broadbury*, 8 Maine, 181; Story on Agency, § 489; *Norton* v. *Sjolseth*, 43 Washington, 327.

Even if there had been a trust imposed upon the commissioner by consent, it was revoked by the death of Charley Jacobs prior to its execution. *Harmon* v. *Smith*, 38 Fed. Rep. 482; 4 Kent's Comm. 310 and note; *Gartland* v. *Nunn*, 11 Arkansas, 720; *Bradstreet* v. *Kinsella*, 76 Missouri, 63; 28 Am. & Eng. Enc. of Law (2d ed.), 1000.

The Secretary of the Interior has no judicial power to adjudge a forfeiture, to decide questions of inheritance or to divest the owner of his title without his knowledge or consent. *Richardville* v. *Thorp*, 28 Fed. Rep. 52; *Jones* v. *Meehan*, 175 U. S. 1.

To allow the construction contended for by respondent, means that the property of plaintiffs in error will be taken from them without due process of law, and contrary to the Fourteenth Amendment.

Plaintiffs in error have been vested with the title by descent from their ancestors and cannot be divested of the title without being made personally parties to the proceeding.

The record does not show a long continued construction of this consent or that it has become a rule of property, or that there is any title involved, except that in this case. This is the first time the matter has ever been before any court.

Defendant in error made no inquiry or investigation before his purchase, but relied wholly upon the regularity of the proceedings.

The act of March 3, 1893, is in derogation of the usual and ordinary rights of citizens, and it will not be enlarged, but will rather be limited and strictly construed by the court.

Mr. Stanton Warburton, with whom *Mr. Overton G. Ellis* and *Mr. John D. Fletcher* were on the brief, for defendant in error:

The allottees named in the patent from the United States took a base or qualified fee simple title subject to temporary restrictions on the right of alienation as held by the Supreme Court of the State of Washington in passing upon a similar patent. *Guyatt* v. *Kautz*, 41 Washington, 115.

The question here presented for determination is not what title Charley Jacobs took as head of a family under the patent, but what was the nature and effect of the written agreement of consent executed by the allottees on March 7, 1898, to the commissioner, appointing him trustee to sell the land in question under the provisions of the acts of March 3, 1893, and June 7, 1897. The act of June 7, 1897, is in all respects similar to the act of March 3, 1893, except that it reduces the number of commissioners to one instead of three. The act of March 3, 1893, does not contemplate the execution of successive agreements of consent; its terms were complied with by the execution of the one agreement of consent provided for in said act, by the original allottees.

The United States was not under any obligations to patent these lands to the Indians. Its determination so to do was voluntary and was an act of gratuity. It therefore had the power to place any condition it might see fit in the grant. *Eells* v. *Ross*, 64 Fed. Rep. 417, 421.

The restriction of alienation was a valid restriction, in no wise inconsistent either with the estate granted or with the citizenship of the Indian. It was so held in *Smythe* v. *Henry*, 41 Fed. Rep. 705; *Libby* v. *Clark*, 118 U. S. 250.

The patent issued on January 30, 1886, prohibited, absolutely, alienation for a longer period than two years.

Congress, in pursuance of the power reserved in the

patent itself, did, by the act of March 3, 1893, confer the power of alienation and prescribe the manner of its exercise. The Government had reserved this power in the patent itself, and the courts have no authority to invoke any technical rules of conveyancing to change or modify the manner in said act provided. *Smythe* v. *Henry*, 41 Fed. Rep. 705.

The Department of the Interior has universally, in all its dealings with the Puyallup Indians and these Indian lands, construed the act in this manner. See letter of July 2, 1897, to Clinton A. Snowden, which contains a clear statement of the construction of the Department as to the meaning of this act, and the court should be slow to adopt a different construction when the terms of the statute warrant the construction given it by the Department.

Where a statute entrusted the carrying out of its own provisions to one of the Executive Departments of the Government, the interpretation of the statute by such department will be followed by the courts unless there are most cogent reasons to the contrary. *Prichard* v. *Jacobs*, 46 Washington, 562, 570; *United States* v. *Moore*, 95 U. S. 760, 764; *Edwards* v. *Darby*, 12 Wheat. 206; *Brown* v. *United States*, 113 U. S. 568, 574; *Louisiana* v. *Garfield*, 211 U. S. 70, 78; *Robertson* v. *Downing*, 127 U. S. 607, 614; *United States* v. *State Bank*, 6 Peters, 29, 40.

In all cases of ambiguity the contemporaneous construction not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling. *Schell* v. *Fauche*, 138 U. S. 562, 573; *United States* v. *Cerecedo*, 209 U. S. 337; *Hastings & Dakota R. Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Burlington R. R. Co.*, 96 U. S. 334; *United States* v. *Pugh*, 99 U. S. 265, 272; *Hahn* v. *United States*, 107 U. S. 402, 406; *Smythe* v. *Fiske*, 23 Wall. 374, 383; *United States* v. *Johnson*, 124 U. S. 236, 255;

United States v. *Finnell*, 185 U. S. 236, 254; *United States* v. *Alabama R. R. Co.*, 142 U. S. 615, 622; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Stuart* v. *Laird*, 1 Cranch, 299, 309.

State courts have likewise followed this same rule in construing statutes. *McSorley* v. *Hill*, 2 Washington, 638, 651; *Keane* v. *Brygger*, 3 Washington, 338, 350; Sutherland, Stat. Const. (2d ed.), § 474; *Smith* v. *Ross*, 42 Washington, 439, 445; *Blair* v. *Brown*, 17 Washington, 570, 573.

The Supreme Court of Wisconsin holds that a uniform construction by the department to which an act is referred for the carrying out of its provisions will be followed by the courts even when the courts would not have so construed the act in the first instance. *Herrington* v. *Smith*, 28 Wisconsin, 68; *Bloxham* v. *Electric Light* (Fla.), 18 So. Rep. 444; *Copper Queen Mining Co.* v. *Arizona*, 84 Pac. Rep. 511, 516; *Van Veen* v. *Graham County*, 108 Pac. Rep. (Ariz.) 252.

The land was sold for its fair value. The purchaser has paid the price. The Department has examined and approved all steps leading up to the deed, and the purchaser took his deed relying upon the Department, to which the act itself entrusted the execution of its provisions, as having done its duty in the premises. The purposes of the act have been fully met; viz.: the protection of the Indians from improvident sales.

It makes no difference that Charley Jacobs was a citizen of the United States. There is no authority for the contention that a citizen cannot hold a base or qualified title. There is ample authority for the converse. *Beck* v. *Flourney Co.*, 65 Fed. Rep. 30, 35; *Eells* v. *Ross*, 64 Fed. Rep. 417, 421; *Smythe* v. *Henry*, 41 Fed. Rep. 705; *United States* v. *Flourney Co.*, 71 Fed. Rep. 576, 579.

The authorities relied upon by the plaintiffs in error are not applicable. *Guyatt* v. *Kautz*, 41 Washington, 115;

Pickering v. *Lomax*, 145 U. S. 310, 316; *Lykins* v. *McGrath*, 184 U. S. 169.

The fact that this land has advanced in value since the sale, is no reason whatever for now seeking to so construe the statute as to invalidate the title of the defendant in error.

Since the decision in the case at bar, the Supreme Court of the State of Washington has passed upon the same question, and followed this decision in the case of *Little Bill* v. *Swanson*, 117 Pac. Rep. 481; *Little Bill* v. *Dyslin*, 117 Pac. Rep. 487.

See also on question of Indian lands and the government supervision over the same, *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Starr* v. *Campbell*, 208 U. S. 527; *Marquez* v. *Frisbie*, 101 U. S. 473.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to the Supreme Court of Washington to review a decree of that court which affirmed a decree of the Superior Court of the County of Pierce adjudging defendant in error, who was plaintiff in the trial court, to be the owner of the east half and the east half of the east half of the west half of the northeast quarter of the northwest quarter of section 35, township 21 N., R. 3 east of the Willamette Meridian, Pierce County, Washington, formerly in King County, Washington.

The land lies in the Puyallup Indian Reservation and was allotted or patented by the United States on January 30, 1886, to Charley Jacobs, the head of a family consisting of himself, Julia, Annie, Frank and Oscar, all Puyallup Indians, the allotment or patent being subject to the stipulations and conditions contained in Art. 6 of the treaty of the United States with the Omaha Indians. Plaintiffs in error were not named in the patent, they not then being born.

Defendant in error claims title under a deed dated February 27, 1901, from C. A. Snowden, trustee and commissioner of Puyallup lands, appointed by the United States Government under an act of Congress dated March 3, 1893 (27 Stat. 612, c. 209), and an amendatory act passed June 7, 1897 (30 Stat. 62, c. 3).

Plaintiffs in error claim title to an undivided one-third part of the lands as heirs of Charley and Julia Jacobs, deceased, and contend that the deed from Snowden is void as to them or as to the interest they would take as such heirs for the reason that the Snowden sale and deed were after the death of Charley and Julia Jacobs.

Article 6 of the treaty of the United States with the Omaha Indians (March 16, 1854, 10 Stat. 1043), to the conditions of which the patent to Charley Jacobs was made subject, empowered the President to cause allotments to be made from reservation lands to such Indians as were willing to avail themselves of the privilege and who would locate on the same as permanent homes. The patent was to be issued upon the further condition that the assigned land should not "be aliened or leased for a longer term than two years" and "should be exempt from levy, sale or forfeiture." Upon the formation of a State these restrictions could be removed by the legislature, but it was provided that they could not be removed without the consent of Congress. It was also provided that lands not necessary for assignment might be sold for the benefit of the Indians under such rules and regulations as might thereafter be prescribed by Congress or the President of the United States.

Under the act of March 3, 1893, the President was empowered to appoint a commission of three persons to select and appraise such portion of the allotted lands not required for homes of the Indian allottees. It was provided that if the Secretary of the Interior approved the selections and the appraisement the lands selected should

be sold for the benefit of the allottees, after due notice, at public auction, at no less than the appraised value.

It was the duty of the commission to superintend the sale of the lands, ascertain the true owners thereof, and have guardians appointed for minor heirs of deceased allottees and make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior. The deeds, it was provided, should operate as a complete conveyance of the lands upon a full payment of the purchase money. The disposition of the money was provided for, and it was provided further that no part of the lands should be offered for sale until the Indian or Indians entitled to the same should sign a written agreement consenting to the sale thereof, and appointing the commissioners, or a majority of them, trustees to sell the land and make deeds to the purchasers. The approval of the Secretary was made necessary to the validity of the deeds, and he was directed to make all necessary regulations to carry out the provisions of the act.

On November 6, 1893, the Secretary instructed the commissioners, in accordance with the terms of the act as to the appraisement of the lands, and to ascertain who were allottees or the heirs of allottees or heads of families under the laws of Washington, to have guardians appointed for the minor heirs of deceased allottees and to obtain the consent of the heirs of twenty-one years and of such guardians. The commissioners were directed to report to the Secretary their action for approval, and, if approved, further instructions were to be given.

By an act subsequent to that of March 3, 1893, to-wit, an act of June 7, 1897, the number of commissioners was reduced to one and Clinton A. Snowden was appointed commissioner. Instructions were given to him and he was informed as follows: "That the title under these patents vests in the family whose names are recited in the patent, and not in the head of the family. It is

necessary to obtain the written consent of all the members of the family named in the patent. That it is necessary to have legal guardians appointed for minors who are themselves allottees, but not minor heirs of deceased allottees. It is necessary to obtain the written consent of sale of allotments of all members of the family named in the patent, and natural guardians and parents of minors are incompetent for this purpose, as in the case of minor heirs of deceased allottees."

On January 18, 1901, in answer to an inquiry of Snowden, the Secretary instructed him that where the allottees and true owners of the lands had executed consents of sale which had been approved by the Secretary it was the practice of the Department to continue the sale of the lands covered thereby, though the allottee or owner died, and to distribute the funds arising therefrom to his or her heirs, the Department regarding the "consents as remaining in full force and effect upon the decease of the Indian executing the same," they being "in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease." The Secretary added: "These lands are sold under the provision of the Act of Congress, March 3, 1893, and not under the laws of the State of Washington. . . . It is for the Department to pass upon the sufficiency of consents and not the courts of the State of Washington."

Charley Jacobs was, as we have seen, the grantee in the patent as the head of a family consisting of himself, Julia, Annie, Frank and Oscar. Julia was his wife, Annie his sister, Frank his son by a former wife, and Oscar his son by his wife, Julia.

Lillie Jacobs and Ruther Jacobs, plaintiffs in error, are respectively, a daughter and son of Charley and Julia and were born, respectively, in the years 1888 and 1891—that is, after the patent was issued—and necessarily were not named therein.

Annie, who was named in the patent, died in November, 1888, never having been married, and leaving Charley Jacobs her sole heir. He, on the seventh of March, 1898, Julia Jacobs and Frank Jacobs, all of age and named in the patent, executed a written consent required by the statute directing Commissioner Snowden to sell the lands.

Charley Jacobs, as guardian of Oscar Jacobs, named in the patent, having been previously appointed by the Superior Court of Pierce County, executed a similar consent and also a similar consent as the sole heir of Annie, named in the patent.

These consents and other papers were duly transmitted to the Secretary of the Interior and approved by him, and Snowden, on the twenty-seventh of February, 1901, duly offered the lands for sale at public auction. They were purchased by A. G. Prichard, trustee, in accordance with the statute, he making the payment required. Snowden executed a deed to him, which was duly approved by the Secretary of the Interior, and duly recorded in the Office of Indian Affairs.

Prior to the commencement of this action Prichard made the payments required, which were received and accepted by the Interior Department for distribution to those entitled to the same, including Ruther Jacobs and Lillie Jacobs, plaintiffs in error. Their guardian, E. D. Wilcox, has not received the same and refused to accept the sum, except a cash payment of $420.

Charley Jacobs died January 2, 1900, leaving surviving him, among others, the plaintiffs in error, who, as we have said, were not named in the patent. His death was reported to the Commissioner of Indian Affairs by Snowden May 1, 1900.

Wilcox is the duly appointed guardian of plaintiffs in error, and reported to the court the receipt by him of the payment of $420 made by Prichard. He did not know, however, that the sale by Snowden was after the death of

Charley Jacobs, father of plaintiffs in error, until after the commencement of this suit, and, as soon as he discovered that fact, refused to receive any further payment. The money received by plaintiffs in error as their share of the purchase price of the land was tendered to defendant in error prior to the trial of the action.

At the time Prichard, defendant in error, purchased the land he did not know of the death of Charley Jacobs, and was at no time advised of it or of the existence of plaintiffs in error until shortly before bringing this action. He purchased the property in good faith, relying upon the representations of Snowden, and in the full belief of the regularity of the proceedings.

We have stated the facts thus fully, although they are not disputed, as they exhibit clearly upon what right the Secretary of the Interior proceeded in his instructions to Commissioner Snowden and the strict compliance of the latter with those instructions. It will be observed that where the allottees and true owners executed consents which had been approved by the Secretary, it was the practice of the Department to continue the sale of the lands covered thereby, though the allottee or owner died, and to distribute the funds arising therefrom to his or her heirs, the Department regarding the "consents as remaining in full force upon the decease of the Indian executing the same," they being "in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease." The Secretary expressed the view that the "lands are sold under the provisions of the act of Congress, March 3, 1893, and not under the laws of Washington. . . . It is for the department to pass upon the sufficiency of consents and not the courts of Washington."

Defendant in error takes the view that the consents remained good after the decease of the Indian who gave them, in this case Charley Jacobs, and was "in the nature

of a permanent power or trusteeship." On the other hand, plaintiffs in error contend that the consent was a "naked power to sell," and terminated with the death of the giver.

There can be no doubt of the power of Congress to give character to the consents. *United States ex rel. Lowe* v. *Fisher, ante*, p. 95; *The Cherokee Nation et al.* v. *Whitmire, Trustee, ante*, p. 108. The questions in the case, therefore, turn upon the statute, and both sides invoke it to sustain their respective contentions.

The patent to Charley Jacobs was made subject to the conditions and restrictions of the sixth article of the treaty. In other words, there was a limitation upon the right of alienation of the patented lands, and the ultimate power to remove this restriction and grant a right of full alienation was reserved to Congress. The act of 1893 was an exercise of this power. It provided for the sale of such part of the allotted lands as was not required for the homes of the Indians, and prescribed the conditions of the sale to be "a written agreement consenting to the sale," signed by the Indian or Indians entitled to the allotted land offered for sale. And it was provided further that the agreement should constitute the commissioners, or a majority of them (subsequently one commissioner), trustees to sell the lands and "make deeds to the purchasers for the same," subject to the approval of the Secretary of the Interior, which deeds should "operate as a complete conveyance of the land upon the full payment of the purchase money." It is manifest that the "consent" required created something more than a mere revocable agency. It was a written agreement giving the commissioner (we drop the plural) full power to execute the provision and policy of the act of Congress, a power which could be confidently counted on as continuing against contingencies, and to terminate in a "complete conveyance of the land."

That the "consent" was to have this character was the

immediate and continued construction of the act of Congress by the Interior Department, and such construction would determine against ambiguity in the act even if we should admit ambiguity existed. The rule which gives strength to the construction of the officers who are directed to execute the law and who, it has been said, may have written or suggested it, is given an added force from one of the provisions of the act of Congress. It directs the Secretary of the Interior "to make the necessary regulations to carry out the purposes" of its enactment.

But we find no ambiguity in the act when we consider its purpose and the habits of Indian life. It could not have been intended that when proceedings had been instituted under it they should be embarrassed always by the possibility of defeat, and, it may be, progressing up to the moment of the delivery of the deed to a purchaser, should be made useless and nugatory by the death of some roving Indian. It is to be noted that all the proceedings are under the control of the Secretary of the Interior and that any irregularity in them or improvidence in the consents can be corrected by him.

We do not answer in detail the argument of plaintiffs in error based on the law of agency because we do not think its analogies are applicable to the situation.

The Supreme Court of Washington has repeated its ruling in this case in two others, *Little Bill* v. *Swanson*, 117 Pac. Rep. 481; *Same* v. *Dyslin*, Id. 487.

Judgment affirmed.